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THE LAW REPORTS

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1913.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1913.

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1913.

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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

PARKES AND OTHERS, APPELLANTS *v.* DUDLEY JUSTICES, RESPONDENTS.

1912
Oct. 30.

Licensing Acts—Renewal of Licence—Refusal by Licensing Justices—Appeal—Jurisdiction of Quarter Sessions—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 29, *sub-s.* 4.

An application to justices for the transfer of an old on-licence was adjourned by the justices to the next annual general licensing meeting. Notices of objection to the renewal of the licence were served on the licence-holder and on the proposed transferee. The grounds of objection did not relate to the character of the licence-holder. At the annual general licensing meeting the justices refused to transfer and renew the licence to the proposed transferee on the ground that the house had been ill-conducted. No application was made by the licence-holder for a renewal of the licence to himself. The licence-holder, the proposed transferee, and the brewers appealed to quarter sessions. That Court, being of opinion that the house had not been ill-conducted but that the

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justices had rightly refused to grant a renewal of the licence to the proposed transferee, granted a renewal of the licence to the existing licence-holder:—

Held, that under s. 29, sub-s. 4, of the Licensing (Consolidation) Act, 1910, quarter sessions had power to do so.

SPECIAL CASE stated by Worcestershire quarter sessions.

The appellants (1) appealed to quarter sessions against the refusal of licensing justices to renew the licence of the Brewers' Arms Inn, Birmingham Street, Dudley. On the hearing of the appeal the following facts were proved or admitted:—

The Brewers' Arms was a licensed house of the class described in the Second Part of the Second Schedule to the Licensing (Consolidation) Act, 1910, as an old on-licence other than an old beer-house licence, situate in the county borough of Dudley. The registered holder of the licence was the appellant Joseph Lowe; the registered owners of the house were the appellants Peter Walker & Son, Limited, brewers.

Up to October, 1911, Lowe occupied the house and carried on business there. He then agreed to transfer the licence to the appellant Parkes, and a formal application was made to the justices to transfer the licence from Lowe to Parkes. On the hearing of the application the justices adjourned it to the annual general licensing meeting in 1912, and granted to Parkes a protection order authorizing him to carry on the business of licensed victualler at the Brewers' Arms until the annual general licensing meeting in 1912. On January 20, 1912, the chief superintendent of police for the borough of Dudley served on Lowe a notice of his intention to oppose at the annual general licensing meeting the renewal of the licence to Lowe on the grounds (1.) that Lowe had not produced satisfactory evidence of good character; (2.) that the house had been ill-conducted; (3.) that the licence was not required; and (4.) that the premises were not structurally suitable for the business carried on there. A similar notice of intention to oppose the renewal of the licence to Parkes was served on Parkes, the grounds of opposition being the

(1) In this report the terms "appellants" and "respondents" are used with reference to the position of the parties at quarter sessions.

same, with the additional ground that Parkes was not a fit and proper person to hold a licence.

On February 2, 1912, the justices at the annual general licensing meeting heard the adjourned application of Parkes for the transfer and his application for the renewal to him of the licence, and refused both applications, and caused a notice in writing to be served upon him stating that the ground of the refusal to renew was that the premises had been ill-conducted.

No evidence was given at quarter sessions as to whether Lowe had been heard by the justices before they refused the renewal of the licence, nor as to whether any notice of the refusal to renew was served upon him.

Notice of appeal against the refusal of the justices to transfer and renew the licence to Parkes was given by the appellants Parkes, Lowe, and Peter Walker & Son, Limited.

On the hearing of the appeal at quarter sessions it was contended on behalf of the respondents, the justices, that in the circumstances quarter sessions had no power to renew the licence to Lowe.

No evidence of character which in the opinion of the Court of quarter sessions was sufficient to deprive Lowe of a renewal of the licence was produced, and the Court held that in the case of an old on-licence, other than an old beer-house licence, the onus was not on the applicant to produce satisfactory evidence of good character, but that by the Second Part of the Second Schedule to the Licensing (Consolidation) Act, 1910, the onus was on the opponents of the renewal to prove the want of good character or fitness of the applicant.

The Court of quarter sessions further found as a fact that it was not proved that the house had been ill-conducted by Lowe or Parkes, but they held that the justices were not wrong in refusing to transfer and renew the licence to Parkes.

The Court of quarter sessions further held that the opponents to the renewal had failed in fact to prove the other objections to the renewal, and they granted a renewal of the licence to Lowe.

The questions of law for the opinion of the Court were (1.) whether quarter sessions were right in holding that under the Second Part of the Second Schedule to the Licensing

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(Consolidation) Act, 1910, the onus of proof as to the character or fitness of the applicant for the renewal of an old on-licence, other than an old beer-house licence, was on the opponents to the renewal and not on the applicant; (2.) whether in law on the facts stated quarter sessions were right in granting a renewal of the licence to the appellant Lowe.

Hon. R. W. Coventry (*D. Cotes-Preedy* with him), for the respondents. The jurisdiction of quarter sessions in licensing matters is appellate only, not original, and in the circumstances of this case there was no power to grant a renewal of the licence to Lowe. The only application before the licensing justices was for a transfer and renewal of the licence to Parkes. If Lowe desired, in the event of the justices refusing Parkes' application, to have the licence renewed to himself, he should have applied for it. It is true that by s. 16, sub-s. 2, of the Licensing (Consolidation) Act, 1910, the holder of a licence applying for a renewal need not attend the annual licensing meeting unless he is required to do so; but the renewal cannot be granted even to the existing holder of the licence if he does not in fact apply for it: *Sharpe* v. *Wakefield*, per Lord Esher M.R. (1); and in fact Lowe never did apply for a renewal. The appeal to quarter sessions was against the refusal to transfer and renew the licence to Parkes, and though Lowe may, as a party "aggrieved" by the decision of the justices, have rightly been a party to the appeal, the only question to be determined on the appeal was whether the licence should be renewed to Parkes, and on that question the decision of the licensing justices was affirmed. Sect. 29, sub-s. 4, of the Act of 1910 (2), which provides that quarter sessions may grant the renewal "in the same manner as the licensing justices," does not give quarter sessions power to grant a renewal to a person who has not applied to the licensing justices for a renewal. The practical result of Lowe's not

(1) (1888) 22 Q. B. D. 239, at p. 242.

(2) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29, sub-s. 4: "The Court of quarter sessions shall hear and determine the matter of the appeal, and make such order therein with or without costs, as the Court think fit, and may, if necessary, grant the renewal, transfer, or special removal of the licence in the same manner as the licensing justices."

applying to the licensing justices is that quarter sessions were deprived of the opportunity of investigating the fitness of Lowe to continue to be the holder of the licence. (1)

Clavell Salter, K.C. (*Graham Milward* with him), for the appellant Lowe. It is important to bear in mind that there were two applications before the licensing justices. There was the adjourned application for the transfer of the existing licence from Lowe to Parkes, which licence would remain in force till April 5; and there was also the application of Parkes for the renewal of the licence to him for twelve months from April 5. The renewal was refused, not on any ground affecting the character of Lowe, but on the ground that the house had been ill-conducted. It was not necessary for Lowe, he being the licence-holder, to make any formal application to the justices after the refusal of Parkes' application for a renewal to himself, and it would have been within the powers of the justices to grant a renewal to him, but as they had already refused to grant a renewal of the licence to Parkes on a ground affecting only the house itself and not the character of the applicant, it would obviously have been useless for Lowe to have applied for a renewal. Quarter sessions, being satisfied that the house had not been ill-conducted by either Parkes or Lowe, had power under s. 29, sub-s. 4, to grant a renewal to Lowe, he being a person to whom the licensing justices might, if they had thought fit, have granted a renewal.

[He was stopped.]

(1) Counsel for the respondents did not contend that the decision of quarter sessions on the first question stated in the case was wrong.

The Licensing (Consolidation) Act, 1910, s. 18, sub-s. 1, provides that: "The power to refuse the renewal of any such justices' on-licence as is described in the First Part of the Second Schedule to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the Second Part of that schedule shall be vested in the compensation authority and not in the licensing justices . . . ."

The grounds specified in the Second Part of the Second Schedule in the case of an old on-licence, other than an old beer-house licence, are:

"(1.) the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable:

"(2.) grounds connected with the character or fitness of the proposed holder of the licence:

"(3.) the ground that the renewal of the licence would be void."

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Hon. R. W. Coventry in reply. Quarter sessions, having no original jurisdiction, cannot grant a renewal of a licence to a person who has never applied to the licensing justices for it.

LORD ALVERSTONE C.J. In my opinion our decision must be against the contention raised on behalf of the respondents, the licensing justices. The notice of objection which was served on the appellant Lowe stated certain grounds on which it was intended to oppose the renewal of the licence. It is provided by s. 16, sub-s. 2, of the Licensing (Consolidation) Act, 1910, that "the holder of a justices' licence applying for the renewal of his justices' licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices to attend, and he shall not be required so to attend save for some special cause personal to himself"; and by s. 18, "the power to refuse the renewal of any such justices' on-licence as is described in the First Part of the Second Schedule to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the Second Part of that schedule shall be vested in the compensation authority and not in the licensing justices."

The grounds of objections contained in the notice served upon the appellant Lowe were not grounds connected with his fitness or character but had reference to the licensed premises, and, therefore, Lowe's personal attendance at the annual general licensing meeting was not necessary, nor was it permissible for any question as to his personal character to be entertained at that meeting.

At the general annual licensing meeting the justices refused to transfer and renew the licence to Parkes on the ground that the house had been ill-conducted. In the circumstances the justices would in my opinion have had ample jurisdiction to renew the licence to Lowe, because, as I have said, there was nothing in the notice of objection which had been served on him which required his personal attendance or which required anything to be proved before a renewal could be granted to him. The justices, however, refused to renew the licence on grounds which were independent

of the personal character of either Parkes or Lowe. It was in fact a decision not to grant a renewal to any one.

The next step is the appeal to quarter sessions, and in view of the argument based on the fact that Lowe did not make a formal application for renewal at the annual general licensing meeting it is important to notice that the brewers were parties to the appeal. The brewers were of course under no obligation to attend the annual general licensing meeting, but when the justices had refused to renew the licence to Parkes on the ground that the house had been ill-conducted, the brewers as well as Parkes and Lowe became persons "aggrieved" within the meaning of s. 29, sub-s. 1, of the Act by the decision of the licensing justices, and were entitled to appeal to quarter sessions. The powers of quarter sessions in licensing appeals are defined by sub-s. 4 of s. 29 of the Act of 1910, which provides that "The Court of quarter sessions shall hear and determine the matter of the appeal, and make such order therein with or without costs, as the Court think fit, and may, if necessary, grant the renewal, transfer, or special removal of the licence in the same manner as the licensing justices." It is not disputed by counsel for the justices that if, after the refusal by the justices of Parkes' application, Lowe had formally applied to the licensing justices for a renewal of the licence to himself, it would have been refused on the same ground as Parkes' application was refused, and it seems to me to follow that under s. 29, sub-s. 4, quarter sessions have the power to do what the licensing justices could have done, that is to say, to entertain an application by Lowe for the renewal of the licence to him, and, if they think fit, to grant it. In my opinion the intention was that quarter sessions should have full jurisdiction to keep the licence alive if they do not agree with the reasons of the licensing justices for refusing the renewal to a particular person, and it would seriously curtail the powers of quarter sessions if we were to hold that the only person who could get a renewal on the hearing of an appeal at quarter sessions was the person who had made the application for the renewal at the annual general licensing meeting.

For these reasons I am of opinion that quarter sessions had

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power in the circumstances of this case to grant a renewal of the licence to Lowe.

CHANNELL J. I am of the same opinion. The case seems to me a very clear one. I quite agree that quarter sessions have only an appellate jurisdiction, but in the exercise of that appellate jurisdiction the Court has, in my opinion, full power to do everything which the licensing justices could do, and to entertain an application for a renewal which might have been made to the licensing justices, and which would in the present case have been made to them but for the fact that the reason given for the refusal of Parkes' application involved the refusal of the renewal of the licence to any one, and therefore an application by Lowe would have been useless. I think that, strictly speaking, after the refusal of quarter sessions to grant a renewal to Parkes on grounds which did not apply to Lowe, the latter should have formally applied to that Court for a renewal to himself, but the Court appears to have taken it for granted that he did apply, and I do not think that the absence of a formal application by Lowe has any real bearing on the question. In granting a renewal of the licence to Lowe quarter sessions did what the licensing justices might have done, and in so doing quarter sessions did not in my opinion in any way exceed the powers given by s. 29, sub-s. 4, of the Act of 1910.

AVORY J. I agree. No question could have arisen if the licensing justices had not adjourned the application for a transfer to the annual general licensing meeting, but having adjourned it, I think there must be deemed to have been an application by Lowe for a renewal of the licence to himself in the event of the transfer to Parkes not being granted, for otherwise the licence would have lapsed at the conclusion of the current year. If that is the true view no foundation is left for the argument that quarter sessions had no jurisdiction to grant a renewal to Lowe. But apart from that point, I entirely agree that quarter sessions had jurisdiction to say to whom the renewal should be granted, and I know that it has been the practice of quarter sessions for many years, when the character of the applicant for a transfer of a licence is not

approved of, to renew the licence to the existing holder on the understanding that a suitable new tenant will be found. In my opinion s. 29, sub-s. 4, gives quarter sessions jurisdiction to do what was done in this case.

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PARKES v. DUDLEY JUSTICES.

Appeal dismissed.

Solicitors for respondents: *Chester, Broome & Griffithes, for Joseph Smith, Dudley.*

Solicitors for appellant: *Kirby, Millett & Ayscough, for C. Round, Tipton.*

F. O. R.

LONDON COUNTY COUNCIL, APPELLANTS *v.* ALLEN, RESPONDENT.

1912
Oct. 30.

Inland Revenue—Male Servants—Driver of Vehicle conveying Children to School —"Coachman"—Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 19.

The respondent was a carman and contractor, and was under contract with the appellants to convey in certain omnibuses and ambulances supplied by the appellants, and drawn by horses supplied by the respondent, defective children from their homes to public elementary schools. The drivers of the vehicles were employed by, and were in the exclusive service of, the respondent:—

Held, that the drivers were not coachmen within the meaning of s. 19, sub-s. 3, of the Revenue Act, 1869, and that the respondent was, therefore, not liable to pay in respect of them the duty imposed by s. 18 of the Act on "male servants" as defined by s. 19, sub-s. 3.

CASE stated by a metropolitan magistrate.

An information was laid by the appellants against the respondent wherein the respondent was charged for that he on December 15, 1911, at Manor Place, Hackney, did employ three male servants without having proper licences as in that behalf was required by the Revenue Act, 1869. (1)

(1) Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 18: "On and after January 1, 1870, there shall be granted, charged, levied, and paid, ... under and subject to the provisions and regulations in this Act contained, the following duties, that is to say:

"For every male servant . . 15*s.* 0*d.*

. . . .

And such duties respectively shall be paid annually upon licences to be

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LONDON COUNTY COUNCIL v. ALLEN.

Upon the hearing of the information the following facts were proved or admitted :—

The respondent was a carman and contractor and was under contract with the appellants to convey in certain vehicles supplied by the appellants, drawn by horses supplied by the respondent, defective children from their homes to certain neighbouring public elementary education schools provided by the appellants. The vehicles conspicuously bore the letters "L. C. C." on them.

On December 19, 1911, three coachmen, employed by and in the exclusive service of the respondent, in the course of the said contract drove certain of the children in a school omnibus and two ambulances from their homes to the schools. No licences as required by the Revenue Act, 1869, had been taken out by the respondent in respect of the three coachmen or any of them.

At an interview with a local taxation officer in the employment of the appellants, the respondent informed the officer that the three coachmen were occupied in his service daily on school days from 7 A.M. to 8 A.M. in preparing the vehicles and horses at the respondent's stables; from 8 A.M. to 10.30 A.M. in calling for and picking up the children at their homes and driving them to the schools; from 10.30 A.M. to midday in attending to the horses attached to the vehicles at the respondent's stables; from 1 P.M. to 2.15 P.M. in again preparing the vehicles and horses for the afternoon's work, which consisted in attending with the vehicles

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taken out under the provisions of this Act by the person who shall employ the servant . . . ."

Sect. 19: "(3.) The term 'male servant' means and includes any male servant employed either wholly or partially in any of the following capacities; that is to say, maître d'hôtel, house steward, master of the horse, groom of the chambers, valet de chambre, butler, under butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under gardener, park keeper, gamekeeper, under gamekeeper, huntsman, and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called:

"(4.) Every person who shall furnish any male servant on hire shall, for the purposes of this Act, be deemed to be the employer of such servant:"

at the schools and conveying the children back to their respective homes, being occupied from about 2.15 P.M. to 4.15 P.M. therein; from 4.45 P.M. to 6 P.M. the men attended to the horses attached to the vehicles at the respondent's stables, when their day's work was ended. During the time the coachmen were driving the vehicles for the purposes aforesaid they wore liveries.

The magistrate was of opinion, on the evidence, that the coachmen whilst they were in the service of the respondent were not male servants in respect of whom the respondent was required to take out and hold licences under s. 18 of the Revenue Act, 1869; that they were not kept for the purpose of luxury or for any domestic purpose, but for trade purposes only, being persons in the employ of a contractor for hire and in the way of trade. He accordingly dismissed the information.

The question for the opinion of the Court was whether upon the above facts the decision of the magistrate was correct in point of law.

Bodkin, for the appellants. The word "coachman" in s. 19, sub-s. 3, of the Revenue Act, 1869, means a man who drives horses attached to a vehicle which carries human beings, as distinguished from vehicles which carry goods only. The facts found with regard to the work performed by these servants of the respondent shew conclusively that they are coachmen within the section. If the duties of a male servant are such as to constitute him one of the particular kind of servants mentioned in s. 19, sub-s. 3, it is immaterial that he is kept for the purpose of his employer's trade or business and not for the purposes of luxury or for any domestic purpose: *Spencer* v. *Sheerman* (1); *Marchant* v. *London County Council.* (2) [He also referred to *Whiteley* v. *Burns.* (3)]

Foote, K.C., and *Harold Brandon*, for the respondent. It is not disputed that if a man has male servants who are employed in any of the capacities specified in s. 19, sub-s. 3, the fact that they are so employed for the purpose of their master's trade or business does not exempt him from payment of the tax. The

(1) (1871) 23 L. T. 873. (2) [1910] 2 K. B. 379.
(3) [1908] 1 K. B. 705.

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question is whether these particular servants of the respondent are coachmen within the meaning of the section. The suggested definition of coachman is far too wide and would include many drivers of vehicles whom no one would call coachmen. The persons specified in s. 19, sub-s. 3, are all persons engaged in discharging duties of domestic and personal service. The magistrate rightly held that having regard to the duties performed by the respondent's servants they were not coachmen within the meaning of the section.

Bodkin replied.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be dismissed. The magistrate based his decision upon the fact that the servants in question were not kept for the purpose of luxury or for any domestic purpose, but for trade purposes only. I pointed out in *Marchant* v. *London County Council* (1) that the fact that a servant is kept for trade purposes only is not conclusive on the question whether his employer is liable to pay the duty in respect of him, but that it is a circumstance which may have some bearing on the question whether a particular servant comes within the Act. Sub-s. 4 of s. 19, which provides that every person who shall furnish any male servant on hire shall for the purposes of the Act be deemed to be the employer of the servant, shews that the Act contemplates cases in which the employer of a servant kept for trade purposes only may be liable to pay the duty. I think, therefore, that the magistrate was wrong in holding that this case was concluded in the respondent's favour by the fact that the servants were employed for trade purposes only. The real question which has to be determined in all these cases is whether the particular servant comes within the definition clause in sub-s. 3 of s. 19. I express no opinion as to how far the old idea still holds good that a servant to come within the section must be kept for the purposes of luxury, but on the facts of this case I come to the conclusion that these men are not "coachmen" within the meaning of that word as used in s. 19, sub-s. 3. I do not agree with Mr. Bodkin's suggested definition of a coachman. In my

(1) [1910] 2 K. B. 379.

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view for the purposes of this Act a coachman means the driver of a carriage for the purposes of pleasure or for domestic purposes; and a man is not necessarily a coachman within the meaning of this section merely because he drives a vehicle containing human beings as distinguished from a vehicle containing goods. I think that the decision of the magistrate that the respondent was not liable to pay duty in respect of these men was right.

CHANNELL J. I agree.

AVORY J. I agree. I think that if the magistrate had confined himself to deciding in the respondent's favour on the ground that the drivers of these vehicles were not employed for the purposes of luxury or for any domestic purpose his decision would not have been open to any criticism, but in my opinion he was wrong in giving as a ground for his decision that the men were kept for trade purposes only. It has been admitted in argument, and rightly so, that if a man is let out on hire for the purpose of performing the ordinary duties of a coachman, the duty would have to be paid in respect of him. In my view all the words used in sub-s. 3 of s. 19 are descriptive of, and are intended to apply to, persons who are employed for domestic purposes, or purposes of pleasure.

Appeal dismissed.

Solicitor for appellants: *Edward Tanner.*
Solicitors for respondent: *Clifford Turner & Hopton.*

F. O. R.

1912
Oct. 28.

NUTTALL, Appellant *v.* PICKERING, Respondent.

Highway — Obstruction — Vehicle — Not allowing Free Passage — Offence — Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 78.

Sect. 78 of the Highway Act, 1835, makes it an offence for any person not to keep his wagon on the left or near side of the road for the purpose of allowing the free passage of other vehicles.

A wagon driven by the appellant was so much beyond the centre of the road that there was not room for a motor car which approached from behind to pass the wagon on its off side. The appellant signalled to the driver of the motor car to pass him on his near side and it did so. The motor car was the only other vehicle on the road at the time, and its driver was not inconvenienced or delayed by the action of the appellant:—

Held, that the appellant had not committed an offence under the above section.

Case stated by justices for the division of Bury in the county of Lancaster.

An information was preferred against the appellant by the respondent under s. 78 of the Highway Act, 1835 (1), alleging that the appellant, on May 3, 1912, at Ramsbottom, in the county aforesaid, then being the driver of a wagon drawn by three horses on a highway called Whalley Road, did not keep his wagon on the left or near side of the road for the purpose of allowing the free passage of any other vehicle or vehicles upon the highway.

On the hearing of the information the following facts were proved:—

On the day in question the appellant was driving a heavily laden lurry along the road, which was a main road twenty-six feet wide. The lurry was not on the left or near side of the

(1) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78: ". . . . If any person shall in any manner wilfully prevent any other person from passing him, or any wagon . . . . under his care upon such highway, or by negligence or misbehaviour prevent, hinder or interrupt the free passage of any person, wagon, cart or other carriage . . . . on any highway, or shall not keep his wagon . . . . or horses . . . . on the left or near side of the road for the purpose of allowing such passage . . . . every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall be liable to a penalty.

road, but was so much beyond the centre as not to leave sufficient space for a vehicle going in the same direction as, or meeting, the lurry to pass with safety on the right or off side of the appellant's vehicle. A motor car approached from behind the lurry, the driver of which sounded his horn and slackened speed. On hearing the motor horn the appellant (without any necessity or sufficient reason, as the justices found) pushed his horses and lurry further over to the right or off side of the road, and beckoned to the driver of the motor car to pass him on the left or near side, and the motor car did so pass.

On behalf of the appellant it was contended that there was no absolute obligation on him to be on the near side of the road, provided that there was no obstruction of traffic in fact, and provided also that the drivers of other vehicles affected were asked and agreed (as was the case here) to pass on the near side.

The justices convicted the appellant, but they were satisfied that the only vehicles on the road at the time and place in question were the appellant's lurry and the motor car, and that, although it was not possible for the driver of the motor car to pass the lurry on its right side, the driver of the motor car was not delayed or inconvenienced by the action of the appellant.

The question of law for the opinion of the Court was whether on the above facts the appellant had been rightfully convicted.

Gordon Hewart, K.C., and *T. C. P. Gibbons*, for the appellant. On the facts found by the justices no offence was committed. It is and always has been the law of England that the driver of a vehicle on a highway may in the absence of other traffic drive upon any part of the road. Sect. 78 of the Highway Act, 1835, cannot be construed as curtailing that right. The section only means that drivers must keep on the near side so as to allow any other vehicle to pass them. It is not an offence to keep in the middle or on the off side of the road if the only other vehicle on the road at the time has room to pass on the near side and its driver is willing to do so.

Merriman, for the respondent. The section is absolute in its terms and requires drivers of vehicles to keep on their near side for the purpose of allowing the free passage of other vehicles.

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This statutory duty does not depend upon the actual presence of some other vehicle desirous of passing.

LORD ALVERSTONE C.J. In my opinion this appeal must be allowed, but I do not wish to give any encouragement to the idea that the driver of a vehicle is entitled to keep in the middle of the road and to compel the drivers of other vehicles to pass him on the wrong side against their will. The appellant was charged under s. 78 of the Highway Act, 1835, with not keeping his wagon on the near side of the road for the purpose of allowing a free passage to other vehicles. The gist of the offence is not allowing a free passage, and that predicates or assumes that there is some other vehicle which is desirous of passing and which is prevented from doing so by the fact that the vehicle in front is not keeping to its near side. The facts found by the justices shew that that was not the case, for the only other vehicle on the road at the time was a motor car, the driver of which was willing and able to pass the appellant's wagon on its near side, and the justices have found as a fact that the motor car was not delayed or inconvenienced by the action of the appellant. On these facts it is I think impossible to hold that the appellant committed the offence with which he was charged. It has been laid down over and over again that in the absence of other traffic the driver of a vehicle is entitled to go on any part of the road that he wishes to, and this particular provision in s. 78 of the Highway Act was not intended, in my opinion, to restrict that right.

CHANNELL J. I am of the same opinion. Where there is no other traffic on the road it is not an offence for the driver of a vehicle to be in the middle or on the off side of the road, and, in my opinion, it is equally no offence if the only other vehicle on the road is asked and consents to pass on the wrong side.

AVORY J. There is a slight difference between the view I take of the facts of this case and that of my Lord and Channell J., but the difference is so slight and unimportant that I do not differ from the conclusion at which they have arrived. I agree with my

Lord in hoping that this decision will not encourage drivers of wagons to think that they can compel motor cars to pass them on the wrong side.

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NUTTALL v. PICKERING.

Appeal allowed.

Solicitors for appellant: *Pritchard, Englefield & Co., for Butcher & Barlow, Bury.*

Solicitor for respondent: *Harcourt E. Clare, Preston.*

F. O. R.

GRAHAM, APPELLANT *v.* TANNER, RESPONDENT.

1912
Oct. 28.

Patent—Patent Agent—Description by Unregistered Person—Offence—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 84.

The Patents and Designs Act, 1907, s. 84, sub-s. 1, provides that a person shall not be entitled to describe himself as a patent agent unless he is registered as a patent agent.

The respondent, who was not a registered patent agent, issued a circular in which his firm were described as "experts and engineers," and in which it was stated in effect that the firm were prepared to do the class of work which is usually done by patent agents, but the circular did not in terms state that the firm were patent agents:—

Held, that the respondent had not described himself as a patent agent.

CASE stated by a metropolitan magistrate.

An information was preferred against the respondent charging that he not being registered as a patent agent had knowingly described himself as a patent agent in a certain document issued by him in contravention of s. 84, sub-s. 1, of the Patents and Designs Act, 1907. (1)

(1) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 84:

"(1.) A person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act or an Act repealed by this Act.

"(3.) If any person knowingly describes himself as a patent agent in contravention of this section he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds.

"(4.) In this section 'patent agent' means exclusively an agent for obtaining patents in the United Kingdom."

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GRAHAM v. TANNER.

On the hearing of the information it was proved that the respondent, who carried on business under the name of George Tanner & Co. at 83, Kingston Road, Ilford, had issued a circular to a person who had taken out a provisional patent, in which the firm were described as "engineers and experts," and which contained the following statements:—

"Our arrangements permit of us quoting the lowest charges for protecting inventions here and abroad. . . . . We notice that you have applied for a patent, and should your provisional application be returned for amendment we can generally procure the acceptance for a nominal fee of 5*s*. . . . . We prepare complete specifications. . . . . Our charges for preparing and filing specifications for home patents, including stamp duty, are [the charges were set out]. Extensive business relations and wide experience in patent matters qualify us to act as your confidential advisers and so carry out your instructions to the best advantage. . . . . It will pay you to employ us as your agents."

On the document was printed, by means of a rubber stamp, "All specification work prepared and revised by a registered patent agent."

The magistrate was of opinion that the respondent had not described himself as a patent agent in this document, and he accordingly dismissed the information. The question for the opinion of the Court was whether his decision was right in law.

Tebbs, for the appellant. The respondent has in effect described himself in this circular as a patent agent, for it states that he is prepared to do the kind of work which is done by a patent agent, and he invites the reader of the circular to employ him as his agent, i.e., as agent for obtaining patents. A man can describe himself as a patent agent within the meaning of s. 84, sub-s. 1, of the Patents and Designs Act, 1907, without expressly calling himself a patent agent. [He referred to *Graham* v. *Eli*. (1)]

Walter, K.C., and *Huntly Jenkins*, for the respondent. It is not an offence for an unregistered person to describe himself as

(1) (1898) 15 Rep. Pat. Cas. 259.

willing to do the work of a patent agent, provided that he does not in terms say that he is a patent agent: *Graham* v. *Fanta.* (1)

Tebbs replied.

LORD ALVERSTONE C.J. In my opinion this appeal must be dismissed. I confess that I have come to that conclusion with great regret, because the circular issued by the respondent appears to me to have been expressly designed to convey the information that he is a patent agent. But we have to construe a penal section of this Act of Parliament, and in my view the section does not prevent an unregistered person from acting as a patent agent; it only says that he must not so describe himself. I am unable to find in this document that the words "patent agent" have anywhere been used as a description of the respondent. In my opinion, therefore, the decision of the magistrate was right.

CHANNELL J. I agree.

AVORY J. I agree. I think that in principle this case is covered by the decision of the House of Lords in *Bellerby* v. *Heyworth* (2), where the distinction was drawn between the description of a man himself and the description of the work done by him.

Appeal dismissed.

Solicitors for appellant: *Radford & Frankland.*

Solicitors for respondent: *C. V. Young & Cowper.*

(1) (1892) 9 Rep. Pat. Cas. 164. (2) [1910] A. C. 377.

F. O. R.

1912
Nov. 1.

WILLS & SONS, APPELLANTS *v.* McSHERRY AND OTHERS, RESPONDENTS.

Justices—Case stated—Non-service of Notice of Appeal and Case on Respondents—Impossibility—Jurisdiction to hear Case—Summary Jurisdiction Act, 1857 (20 & 21 *Vict. c.* 43), *s.* 2.

The respondents to an appeal against a decision of justices by way of case stated were nine seamen, of whom all but one were foreigners. The appellants' solicitor had made every effort to serve the respondents with notice in writing of the appeal together with a copy of the case as required by s. 2 of the Summary Jurisdiction Act, 1857, but had been unable to do so as the whereabouts of the respondents could not be ascertained, except that they were either at sea or abroad :—

Held, that notwithstanding the want of service the Court in the circumstances had jurisdiction to hear the appeal.

Anderson v. *Reid* (1902) 66 J. P. 564, followed.

Foss v. *Best* [1906] 2 K. B. 105, not followed.

CASE stated by justices for the borough and county of the town of Southampton.

At the Southampton county borough petty sessions claims were made by the respondents, nine seamen, against the appellants, the owners of the ship *Hopper No.* 66, under s. 164 of the Merchant Shipping Act, 1894, for extra wages alleged to have been verbally promised to the respondents by the master of the vessel during the time the vessel had been detained in certain ports. The justices gave judgment in favour of the respondents subject to this case.

On the case being called on, counsel for the appellants informed the Court that notice in writing of the appeal and a copy of the case had not been served on the respondents as required by s. 2 of the Summary Jurisdiction Act, 1857. An affidavit sworn by the appellants' solicitor was read, from which it appeared that all the respondents, save one, were foreigners, and that it had been impossible to serve them as none of their addresses could be ascertained. Notices of the appeal with copies of the case had been sent to the last known addresses of the respondents in this country, and with one exception they had been returned marked "gone away." Notice of the appeal and a copy of

the case had also been served on a solicitor who had represented the respondents before the justices. He informed the appellants' solicitor that he was not instructed to act for the respondents on the appeal, but that they had given him addresses to which the money was to be sent in the event of the appeal being unsuccessful. Some of these addresses were in foreign countries, and the remainder were the addresses of the Greek, Russian, and Turkish Consuls at Southampton. Inquiries had been made of these Consuls, and also of the Board of Trade officials at Southampton and at seamen's institutes at Southampton and elsewhere, but in the result no information could be obtained as to the whereabouts of the respondents, except that they were either abroad or at sea.

Raeburn, for the appellants. Although s. 2 of the Summary Jurisdiction Act, 1857, makes it a condition precedent to the hearing of the appeal that the appellant shall within three days of receiving the case serve notice in writing of the appeal with a copy of the case on the respondent, yet if it be proved to the satisfaction of the Court that it has been impossible for the appellant to comply with this condition the Court has jurisdiction to hear the appeal. The authorities are conflicting, but in *Anderson* v. *Reid* (1) this Court, in circumstances similar to those of this case, heard the appeal. *Foss* v. *Best* (2) is a decision the other way, but *Anderson* v. *Reid* (1) does not appear to have been cited to the Court in that case. [He referred to *Syred* v. *Carruthers* (3); *Woodhouse* v. *Woods* (4); *Edwards* v. *Roberts* (5); *Hill* v. *Wright*. (6)]

[AVORY J. referred to *Morgan* v. *Edwards*. (7)]

The respondents did not appear.

LORD ALVERSTONE C.J. In my opinion the Court has power to hear this appeal. It is unfortunate that we did not give any reasons for our decision in *Anderson* v. *Reid* (1), but having regard to the reported argument of the Attorney-General who

(1) 66 J. P. 564.
(2) [1906] 2 K. B. 105.
(3) (1858) E. B. & E. 469.
(4) (1859) 29 L. J. (M.C.) 149.
(5) [1891] 1 Q. B. 302.
(6) (1896) 60 J. P. 312.
(7) (1860) 5 H. & N. 415.

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Lord Alverstone C.J.

was counsel for the appellant in that case and to the authorities which he cited, I have not the least doubt that the reason why we decided to hear the case was that the appellant had done everything in his power to serve the respondent and it was shewn that it had been impossible for him to do so. The first case cited to the Court in *Anderson* v. *Reid* (1) was *Syred* v. *Carruthers* (2), where the head-note states that "when a case is stated under 20 & 21 Vict. c. 43, s. 2 is satisfied if the appellant, within three days of his obtaining the case from the justice, seeks to find the respondent, but cannot do so, and, within such three days, gives notice to the attorney who represented the respondent before the magistrate, and, after the expiration of the three days, gives notice to the respondent, who does not object. Under such circumstances, the Court will hear the appellant though the respondent does not appear." If the real ground of the decision in *Syred* v. *Carruthers* (2) had been the absence of objection by the respondent, who was subsequently served, the decision would give rise to some difficulty, because it has been held in later cases that service on the respondent after the expiration of the three days is not a sufficient compliance with the section; but I do not think that was the ground of the decision, for on reading the argument of Mr. Brett, the appellant's counsel, it appears that he relied on the fact that attempts had been made to serve the respondent within the three days, but that it was impossible to do so, and I think it must have been that to which Lord Campbell C.J. referred in his judgment when he said that there had been a sufficient compliance with s. 2 of the Act of 1857. The next case to which I wish to refer is *Woodhouse* v. *Woods*. (3) In that case no reason was given why service of notice of the appeal with a copy of the case had not been duly made, and it was contended that the omission to do so was a mere irregularity which could be cured. The Court held that that was not so, but Crompton J. said in the course of his judgment: "It struck me that it might be very difficult to give the notice where the respondent could not be found; and we must not be understood as laying down a rule, that in such a case it would not

(1) 66 J. P. 564. (2) E. B. & E. 469.
(3) 29 L. J. (M.C.) 149.

be sufficient if the appellant had done all he could to serve the notice and deliver the case"; and Hill J. said: "I entirely agree that if the appellant has done all that he could do to comply with the statute, it is sufficient, although the notice may not actually have reached the respondent. I see no other way of carrying out the Act"; and Blackburn J. said: "It is not necessary to decide the second point; but if we looked at the authorities, we should find that a condition precedent has been held to be complied with, where it was impossible to perform it." It appears, therefore, that in the opinion of those three learned judges impossibility of serving the respondent would be a valid excuse for not complying with the section. The next case in point of time is *Morgan* v. *Edwards* (1), where the Court of Exchequer agreed with the decision of the Court of Queen's Bench in *Woodhouse* v. *Woods* (2), and Channell B. in delivering the judgment of the Court said: "We guard ourselves, however, as the Court of Queen's Bench did, to this extent, that when an appellant may have done all that he could do in order to comply with the statute, as, for instance, supposing personal service on the defendant to be necessary and made impracticable by his keeping out of the way, there might be ground for considering whether a party might not be allowed to enter his case, though the statute may not have been strictly complied with." Then in *Edwards* v. *Roberts* (3) Day and Lawrance JJ. held that the Court had no jurisdiction to hear the appeal where notice of the appeal and a copy of the case had been served on the respondent after the case had been transmitted to the Court. No reasons are given for the decision and it does not appear whether any attempt had been made in that case to comply strictly with the conditions in the section. In *Hill* v. *Wright* (4) Lord Russell of Killowen C.J. and Wright J. held that service on the respondent's solicitor was not a compliance with the section, but in that case, also, it was not shewn that it had been impossible to serve the respondent personally. In *Anderson* v. *Reid* (5) the respondent was a master mariner, and it was not possible to

(1) 5 H. & N. 415.
(2) 29 L. J. (M.C.) 149.
(3) [1891] 1 Q. B. 302.
(4) 60 J. P. 312.
(5) 66 J. P. 564.

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serve him at the proper time as he was then at sea. A letter was written to him informing him that a case had been stated, which he acknowledged, and some months later on his return from sea he was served personally. The Attorney-General who appeared for the appellant relied on *Syred* v. *Carruthers* (1) and *Woodhouse* v. *Woods* (2) as authorities for saying that the facts shewed a sufficient compliance with the section, and we held that the appellant was entitled to have the case argued. It is, as I have said, unfortunate that no reasons were given for our decision, but having regard to the nature of the argument that was addressed to us I have no doubt that we thought that effect ought to be given to the observations of the judges in the earlier cases as to strict compliance with the statute being unnecessary where service on the respondent is an impossibility. The decision of Darling and Channell JJ. in *Foss* v. *Best* (3) is undoubtedly in conflict with the view which I am now expressing. This being the position of the authorities, I think we ought to follow *Anderson* v. *Reid* (4) rather than *Foss* v. *Best.* (3) The facts of the present case appear to me to be stronger than the facts were in *Syred* v. *Carruthers* (1), except as to the one point that in *Syred* v. *Carruthers* (1) the respondent had subsequently been served, but, as I have pointed out, that may for the present purpose be regarded as immaterial. The evidence here shews that all the respondents have left the country, letters addressed to them have with one exception been returned, and every effort has been made, without success, to find and serve them. The solicitor who represented the respondents before the justices, though he is not instructed to act for them on the appeal, is still acting for them in a sense, for he has their instructions to receive the money on their behalf and send it to them if the appeal should prove unsuccessful, and he has been served with notice of the appeal and copy of the case.

I have come to the conclusion, though not without some doubt, for *Foss* v. *Best* (3) is an authority against my view, that in the circumstances of this case the Court has jurisdiction to hear the appeal.

(1) E. B. & E. 469.
(2) 29 L. J. (M.C.) 149.
(3) [1906] 2 K. B. 105.
(4) 66 J. P. 564.

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CHANNELL J. I am willing to concur in the view that in this case the appeal may be heard, but the question is one of great difficulty, for the matter seems to me to be one of principle, and I cannot help thinking that our decision may be quoted in support of propositions to which it was never intended to be applied. I am sorry that we have not had an opportunity of hearing the case argued on both sides, for one of the difficulties which usually occur in these cases is that the Court is only able to hear the argument of one side. The statute gives this Court jurisdiction to hear appeals from justices by way of case stated subject to certain conditions. The law applicable to the point is clearly stated in Maxwell on the Interpretation of Statutes (5th ed.) at p. 621: "Enactments which impose duties on conditions are, when there are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that lex non cogit ad impossibilia aut inutilia. They are understood as dispensing with the performance of what is prescribed, when performance is idle or impossible. . . . . In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown." The author then refers to *Morgan* v. *Edwards* (1), *Woodhouse* v. *Woods* (2), and *Syred* v. *Carruthers* (3) and says: "If the respondent in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in searching for him, the service required by the statute would probably be dispensed with . . . . Where, however, the act or thing required by the statute is a condition precedent *to the jurisdiction* of the tribunal, compliance cannot be dispensed with; and if it be impossible, the jurisdiction fails." That last passage shews that there is a difficulty in holding that the Court has power to dispense with the performance of the conditions precedent laid down in this statute. If the point is put in that way I think the Court clearly cannot do so. But that is not quite the question which we have to decide.

(1) 5 H. & N. 415. (2) 29 L. J. (M.C.) 149.
(3) E. B. & E. 469.

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Channell J.

The question is whether the statute has been sufficiently complied with if the party has done everything in his power to effect service and it is clearly impossible for him to do so. There are authorities which support both views, but as my Lord has discussed them so fully I need not do so again. I only wish to say as to the decision in *Foss* v. *Best* (1), to which I was a party, that I do not regard that case as a very strong authority against the view which my Lord has expressed. The question was not very much discussed there, and the authorities were not fully gone into, and, speaking for myself, I was prepared to decide against the appellant on a different ground, namely, that as the justices had dismissed the information there was no power to state a case. If the question can be decided on the merits of the particular case, the present case is certainly one in which it is desirable to hear the appeal, and on the facts of this case I am not prepared to say that the Court has not jurisdiction to hear the appeal, but I hope that this decision will not be used as an authority in cases where the facts are very different.

AVORY J. Whilst sharing the doubts expressed by Channell J., I concur in the judgment delivered by my Lord. I only wish to add that notwithstanding the decision in *Hill* v. *Wright* (2) I am not satisfied that, where it appears that a solicitor is still acting for the respondent, service on the solicitor may not be a good service within this section.

The COURT proceeded to hear the case and eventually decided to send it back to the justices for a further statement of the findings of fact.

Case remitted to justices.

Solicitors for appellants : *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

(1) [1906] 2 K. B. 105. (2) 60 J. P. 312.

F. O. R.

MENDL & CO. *v.* ROPNER & CO.

1912
Oct. 28, 29.

Charterparty—Exceptions—"Improper opening of valves"—Neglect to close Discharge Valve—Incursion of Sea Water—Damage to Cargo—Liability of Shipowner.

Under a charterparty the plaintiffs became the charterers of a steamship of which the defendants were owners. By the charterparty the steamship was to proceed to Sulina and there load a cargo of grain and, being so loaded, was to proceed to a port in the United Kingdom or Continent, which in the event was Belfast, with a cargo of grain. The charterparty and bill of lading (of which the plaintiffs were indorsees) for the cargo contained the following exceptions:—"The act of God, perils, dangers, and accidents of the sea or other waters of what nature and kind soever; . . . . and all other accidents of navigation, and all losses and damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk or burnt nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by . . . . improper opening of valves . . . ." The vessel accordingly went to Sulina and proceeded to load a cargo of maize. When the loading of the vessel had proceeded so far that the circulating pump discharge valve became submerged the engineers negligently omitted to close the discharge valve. They also negligently omitted to close the condenser doors, which had been opened for the purpose of draining the pipes. The consequence was that there was an incursion of water through the open valve and condenser doors into the engine-room and thence into the holds, whereby the cargo was damaged:—

Held, that the defendants were not protected by the exceptions from liability for the damage so caused, inasmuch as the words "improper opening of valves" must be construed as including the case of improperly leaving the valves open.

Action tried in the Commercial Court before Bray J. without a jury.

The action was brought by Messrs. F. Mendl & Co., who carried on business in London, and were the charterers of the steamship *Hurworth*, of which the defendants were owners, against the defendants, who carried on business at West Hartlepool, to recover damages for breach of duty in and about the carriage of goods by sea.

By the charterparty, which was dated January 3, 1912, it was

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agreed that the *Hurworth* should with all convenient speed sail and proceed to Sulina and there load, always afloat, a cargo of grain, and, being so loaded, should therewith proceed to a safe port in the United Kingdom or Continent, which in the event was Belfast.

The charterparty and bill of lading (of which the plaintiffs were indorsees) for the cargo contained the following exceptions:— "The act of God, perils, dangers, and accidents of the sea or other waters of what nature and kind soever; fire from any cause on land or on water, barratry of the master and crew, enemies, pirates and robbers, arrests and restraints of princes, rulers and people, explosions, bursting of boilers, breakage of shafts, or any latent defects in hull and/or machinery, strandings, collisions, and all other accidents of navigation, and all losses and damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk or burnt nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage, or absence of customary ventilation, or by improper opening of valves, sluices and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage, but any latent defects in the hull and/or machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners, or any of them, or by the ship's husband or manager."

The *Hurworth* arrived at Sulina and on or about January 23, 1912, proceeded to load a cargo of maize.

At Sulina, owing to the severe frost, the engineers opened the condenser pump doors for the purpose of draining all water out of the pipes. These doors were opened and the pipes were drained on January 23, 1912, the circulating pump discharge valve being also open. On January 26, 1912, when the loading of the vessel had proceeded so far that the discharge valve became submerged, the engineers negligently omitted to close that valve. The engineers also negligently omitted to close the

condenser doors after the pipes had been drained. The consequence was that there was an incursion of water through the open discharge valve and thence through the open condenser doors into the engine-room and thence into the holds, whereby the cargo was damaged.

Atkin, K.C., Leslie Scott, K.C., and *Leck*, for the defendants. The defendants are not liable for the damage to the cargo. The words "even when occasioned by negligence . . . . of the . . . . servants of the shipowner" govern all the excepted perils contained in the clause, including those mentioned before the semicolon. Therefore the first part of the clause down to the words "servants of the shipowner" contains a general list of exceptions in favour of the shipowner. Out of that general list of exceptions a narrower category of exceptions, including damage to cargo occasioned by "improper opening of valves," is carved, these narrower exceptions being in favour of the plaintiffs, the charterers and bill of lading holders. The judgments of the Earl of Halsbury L.C. in *Elderslie Steamship Co.* v. *Borthwick* (1) and Lord Loreburn L.C. in *Nelson Line* (*Liverpool*), *Ld.* v. *James Nelson & Sons, Ld.* (2) shew that the ordinary canons of construction must be applied to charterparties and bills of lading, and the judgment of Bowen L.J. in *Burton* v. *English* (3) shews that one canon of construction is that parties who wish to introduce a provision into the contract in order to shield themselves must use clear words. It follows that if the words "improper opening of valves" are ambiguous they must be construed most strictly against the plaintiffs. That construction is that the word "opening" does not include "not closing" or "leaving open," but is limited to the act of opening, and as the damage to the cargo did not result from the act of opening the valve, but from leaving it open, the plaintiffs are not entitled to recover. But the defendants are not driven to rely upon that rule of construction, which is applicable only as a solvent of ambiguity, for in the present case there is no ambiguity. The words "improper opening of valves" are clear and unambiguous. The first

(1) [1905] A. C. 93. (2) [1908] A. C. 108.
(3) (1883) 12 Q. B. D. 218.

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part of the clause contains a list of heterogeneous exceptions. From that wider list is carved the list of narrower exceptions also heterogeneous. Each exception must therefore be construed according to its grammatical meaning. The word "opening" is not equivalent to "leaving open." It is not the function of the Court to make a contract for the parties which would be more reasonable than the one they have made for themselves. To open is to do something. To forget to open is to do nothing. It is quite reasonable for a shipowner to say that he will be responsible if his servant does something, but will not be responsible if the servant forgets to do something. In order to give effect to the argument for the plaintiffs it would be necessary to hold that the words "by improper opening" include "by improperly leaving open." The word "opening" means the act of opening. [Scrutton on Charterparties and Bills of Lading, art. 6, and *The Southgate* (1) were also referred to.]

Bailhache, K.C., and *A. Adair Roche*, for the plaintiffs. A reasonable business construction must be given to the language of a commercial document. By the terms of the charterparty and bill of lading the defendants were to be liable for the improper opening of valves, and the question is whether what happened in this case comes within the fair business meaning of those words. The act of opening a valve is a momentary act. No appreciable damage ever arises from the act of opening it. Damage always arises from the valve being left open. If the meaning of the words is confined to the mere act of opening, the clause would be reduced to a practical absurdity. [*Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (2), *The Glenochil* (3), and *Phillips* v. *Clark* (4) were also referred to.]

Leslie Scott, K.C., in reply. It is not contended that opening and instantaneously closing a valve will cause any damage, but the meaning of the clause is that valves must not be opened in such circumstances that if they are left open damage will probably occur. It means that a valve must not be opened when it is wrong to open it. In the present case it was not wrong to open

(1) [1893] P. 329.
(2) [1902] 1 K. B. 290.
(3) [1896] P. 10.
(4) (1857) 2 C. B. (N.S.) 156.

the valve at the time it was opened nor to leave it open in the then existing circumstances. The damage was caused by the omission to close it when it became submerged. That omission is not within the words "improper opening," and the defendants are therefore protected by the earlier and wider exceptions.

BRAY J. In this case I have to determine what is the true construction of this clause, and the first thing I ought to consider is whether there is any particular canon of construction which ought to be applied to it. Upon behalf of the defendants Mr. Leslie Scott contends that if there is any ambiguity in the clause I must construe it most strictly against the plaintiffs, the shippers; and he says that the ground upon which he bases his contention is that although the clause may primarily be one for the benefit and protection of the defendants, the shipowners, yet the particular part of it which is in question in this action is for the protection of the plaintiffs, and, therefore, it must be in a case of ambiguity construed most strongly against them. He has cited in support of that proposition the following passage from the judgment of Bowen L.J. in *Burton* v. *English* (1): "But still, what is the sound principle to apply? Why, it is that those who wish to make exceptions in their own favour, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words . . . ." In my opinion that passage does not support the principle contended for by Mr. Leslie Scott. The meaning of the passage is that if it is desired to override the ordinary law clear words must be used in order to effect that object, and I think it would be wrong to say that in the present case the shipowners were trying to override the law with regard to the carriage of goods by sea. They were trying to emphasize it and to make it applicable. I am therefore not disposed to apply against the plaintiffs the canon of construction which Mr. Leslie Scott has relied upon. Nor do I think it is necessary to say that the canon of construction applies against the defendants and that the clause must be construed strongly against them. I do not think it is necessary to apply that canon of construction in the present case. In art. 6 of Scrutton on Charterparties

(1) 12 Q. B. D. 218.

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and Bills of Lading it is stated that these documents "are to be construed according to their sense and meaning, as collected in the first place from the terms used, understood in their plain, ordinary and popular sense . . . ." Being commercial documents the terms used must be understood in a business and practical sense. What in those circumstances is the meaning of the words "nothing . . . . shall exempt the shipowner from liability to pay for damage to cargo occasioned by . . . . improper opening of valves"? On behalf of the defendants it is contended that the natural and ordinary meaning of those words is the act of opening. On behalf of the plaintiffs it has been pointed out that the damage caused by the act of opening is necessarily something extremely small. The parties must have intended something more than that. They must have meant the act of opening plus leaving open. It is impossible to give a business interpretation to the words unless they are read as including the case of leaving valves open. There are other reasons, it seems to me, from a business point of view. What is the difference from a business point of view between negligence consisting of opening and leaving open, and negligence consisting of the omission to shut? It seems to me that it would be rather farfetched to suggest that the parties intended to make a distinction between those two cases, and that the shipowner should be liable in the one case and not in the other. In my judgment, reading the words "improperly opening" in the ordinary plain and popular sense, they include the case of leaving a valve improperly open.

Judgment for plaintiffs.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Lightbound, Owen & Co.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

1912
Oct. 22.

REX *v.* WEBBER.

Criminal Law—Habitual Criminal—Notice of Intention to insert Charge in Indictment of being Habitual Criminal—Grounds upon which Intention to insert Charge is founded—Evidence of Grounds—Sufficiency of Notice—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-s.* 4 (*b*).

A notice given to a prisoner pursuant to s. 10, sub-s. 4, of the Prevention of Crime Act, 1908, that it was intended to insert in an indictment against him a charge that he was a habitual criminal and was leading persistently a dishonest and criminal life contained (inter alia) the following ground:—

"That when you were asked to give some account of yourself, in order that you might have an opportunity of showing that you had since the date of your last release from prison been following some honest employment, you declined to give any information which could be verified on the subject":—

Held, that, although in point of form the ground was not one upon which the prisoner could be convicted of being a habitual criminal, it did not invalidate the notice, inasmuch as it was in fact a notice of the evidence that would be used against the prisoner for the purpose of satisfying the jury that he had not been leading an honest life since the date of his last release from prison, and the fact that the notice stated that the evidence would be given did not make it bad, although there was no legal obligation under the statute to state what evidence would be produced.

APPLICATION by the prisoner Webber for leave to appeal against his conviction.

The prisoner was indicted on September 26, 1912, at the County of London Sessions for housebreaking and further with being a habitual criminal. He pleaded guilty to the housebreaking and not guilty to being a habitual criminal.

The notice given to the prisoner pursuant to s. 10, sub-s. 4 (1),

(1) Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10, sub-s. 4, provides that "a charge of being a habitual criminal shall not be inserted in an indictment—

. . . . . .

"(*b*) unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge;

and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

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of the Prevention of Crime Act, 1908, was (so far as material) as follows:—

"Take notice that in pursuance of section 10, sub-section 4, of the Prevention of Crime Act, 1908, it is intended to insert in the bill or bills of indictment to be preferred against you Charles Webber at the County of London Quarter Sessions to be holden at Newington on the 24th day of September, 1912, a charge under the said Act that you are a habitual criminal and are leading persistently a dishonest and criminal life on the grounds:" Then followed a statement of the grounds, one of which was: "(2.) That when you were asked to give some account of yourself, in order that you might have an opportunity of showing that you had since the date of your last release from prison been following some honest employment, you declined to give any information which could be verified on the subject."

At the trial the prosecution, having proved in accordance with s. 10, sub-s. 2, of the Prevention of Crime Act, 1908, that since attaining the age of sixteen years the prisoner had at least three times previously to the conviction of the housebreaking charged in the indictment been convicted of a crime, proved that police officers had told the prisoner when in custody that his conduct was to be brought to the attention of the Director of Public Prosecutions with a view to his being indicted as a habitual criminal, and he was asked whether he would tell the police of any honest employment in which he had been engaged since his last release from prison ten months previously. He at first refused to say anything. Then he said, "I have done a little work, making boys' knickers." He said he was unable to give the name of any person who had purchased any. On a second occasion when the same inquiry was made of him he said, "The people I have worked for have moved to a fresh address which I do not know." The officer then said, "Well, give me the old address, and I will try and trace them for you." The prisoner said, "I do not know it." Subsequently the prisoner wrote a letter to the officer from Brixton Prison sending him the name and address of a man named Childs. Police officers had seen Childs, and as he was not present, a written statement

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was on the application and express wish of the prisoner read to the jury. This was in the following terms :—

"Frank Childs—his own statement—32 St. George's Road, Peckham, a waste rubber dealer, he calls himself: I am a dealer in waste rubber. I collect from various places and dispose of it at once. I have no business premises. I have known the prisoner Webber as 'Harry' for about eighteen months. I have not employed him regular, but at times have bought some rubber and have had to clear it. I have taken him with me. I cannot give any dates nor say how much I have paid him, but I have given him as much as 5*s*. I refuse to go into the witness-box and say this. I have visited Webber in Brixton Prison, and asked him to say he has worked for me."

C. G. Moran, for the prisoner. The conviction cannot be upheld, and the prisoner ought therefore to be granted leave to appeal against it. The second ground mentioned in the statutory notice given to the prisoner is bad, and no evidence under it ought to have been given, for it throws upon the prisoner the onus of proving that he is not a habitual criminal and is not leading persistently a dishonest or criminal life. That was not the intention of the Legislature. It is for the prosecution to make out the charge. If the prisoner refuses to give the information he is liable, if the ground is good, to be convicted of being a habitual criminal. If he informs the police of the names of the persons for whom he has worked and they are summoned to the Court as witnesses, he is put into the position of being compelled to call them as his witnesses whether he wishes to do so or not, as if he does not call them it naturally follows that his statement that he has worked for them will be disbelieved. If the ground is good the result is that the prisoner must either prove that he has worked or be convicted of being a habitual criminal. When the questions were put to the prisoner he was in custody and ought not to have been then questioned by the police. [*Rex* v. *Fawcett* (1), *Rex* v. *Moran* (2), and *Rex* v. *Maxfield* (3) were referred to.]

(1) (1910) 74 J. P. 444. (2) (1910) 75 J. P. 110.
(3) (1912) 7 Cr. App. R. 230.

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Stebbing, for the prosecution, was not called upon.

The judgment of the COURT (Lord Alverstone C.J., Channell and Avory JJ.) was delivered by

AVORY J. This is an application for leave to appeal against a conviction as a habitual criminal, and it has been suggested that the conviction is bad and ought to be quashed on the ground that the notice required by s. 10, sub-s. 4 (*b*), of the Prevention of Crime Act, 1908, to be given to the prisoner contains a ground which is bad. It is obvious that in point of form the ground is not one on which a prisoner can be convicted of being a habitual criminal; it is in fact a notice of evidence that will be used against the prisoner on his trial for the purpose of satisfying the jury that he has not been leading an honest life since the date of his last release from prison. The fact that the notice states that that evidence will be given does not make it bad, though the statement is unnecessary, as there is no legal obligation under the statute to state what evidence will be produced.

Application for leave to appeal dismissed.

Solicitor for prisoner: *Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *Director of Public Prosecutions.*

J. E. A.

MERRIMAN *v.* GEACH.

1912
Nov. 25.

Practice—Appeal—Application by Defendant for Leave to Appeal in forma pauperis—Opinion of Counsel—Order XVI., r. 23.

A defendant, against whom judgment has been given in the Court of first instance and who applies for leave to appeal against that judgment in forma pauperis, must be treated as being in the position of a person desirous of "suing" in forma pauperis within the meaning of Order XVI., r. 23, and must therefore produce an opinion of counsel that he has reasonable grounds for proceeding.

APPLICATION by the defendant for leave to continue in forma pauperis an appeal against the judgment of an official referee in an action ordered to be tried by him. At the trial judgment was given for the plaintiff. The defendant appealed, and applied ex parte to the Divisional Court for leave as above, when the Court directed notice of the application to be given to the plaintiff.

In support of his application the defendant made an affidavit, in accordance with Order XVI., r. 22, that he was not worth 25*l.*, his wearing apparel and the subject-matter of the action only excepted, but he did not produce an opinion of counsel that he had reasonable grounds for proceeding with his appeal.

The Defendant in person.

T. H. Parr, for the plaintiff. Before the defendant can be admitted to appeal in forma pauperis he must produce an opinion of counsel, as required by Order XVI., r. 23, that he has reasonable grounds for the appeal. No doubt that rule in its strict language only applies to a person desirous of "suing" as a pauper. But in *Ex parte Goldberg* (1) the Court of Appeal, following the decision in *In re Roberts, Kiff* v. *Roberts* (2), laid down as a rule applicable to all cases that upon an application for leave to appeal in forma pauperis the provisions of Order XVI., rr. 22, 23, 24, would be followed by analogy, and the appellant must therefore produce an opinion of counsel as required by r. 23. There is nothing to limit that to an appellant who is plaintiff in the action. In *Handford* v. *George Clarke, Ld.* (3) the Court of

(1) [1893] 1 Q. B. 417. (2) (1886) 33 Ch. D. 265.
(3) [1907] 1 K. B. 181.

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Appeal gave leave to a respondent in an appeal to appear in forma pauperis to resist the appeal without producing an opinion of counsel. The result of those two cases is that the respondent to an appeal need not produce an opinion of counsel in order to obtain leave to resist an appeal in forma pauperis, but that an appellant must do so if he wishes to obtain leave to appeal in forma pauperis.

RIDLEY J. In my opinion the defendant in this case must be treated as a person desirous of "suing" as a pauper within the meaning of Order XVI., r. 23, in this appeal against the judgment of the official referee. That rule provides that "a person desirous of suing as a pauper shall lay a case before counsel for his opinion, whether or not he has reasonable grounds for proceeding." We apply r. 23, relating to a person suing, to a defendant appealing. He is applying to the Court for assistance in the same way as a plaintiff does, and he is therefore in the position of a person suing, and the rule by analogy applies to him. He must therefore under that rule obtain the opinion of counsel that he has reasonable ground for proceeding with his appeal. This application will therefore be adjourned to enable the applicant to comply with this requirement.

SCRUTTON J. I am of the same opinion. As we are laying down a rule of practice contrary to that which appears to be stated to be the practice in some text-books, I desire to state my own reasons for the decision we have arrived at. A person who wishes to obtain leave to proceed in forma pauperis must, if he is a plaintiff, in addition to making an affidavit that he is not worth 25*l.* as required by Order XVI., r. 22, produce an opinion of counsel, as required by r. 23, that he has reasonable grounds for proceeding. If he is defendant, in order to obtain leave to defend in forma pauperis he need only make an affidavit that he is not worth 25*l.*, and he need not obtain the opinion of counsel. The rules are silent as to appeals. It seems, however, from the decisions in *Ex parte Goldberg* (1) and *Handford* v. *George Clarke, Ld.* (2) that the practice prescribed in those rules must be followed

(1) [1893] 1 Q. B. 417. (2) [1907] 1 K. B. 181.

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by analogy in the case of appeals, and in the latter case the Court of Appeal allowed the respondent in an appeal to appear in forma pauperis to resist the appeal without producing an opinion of counsel, thereby treating a respondent to an appeal as being in the position of a defendant in the Court below. In *Ex parte Goldberg* (1) it does not appear whether the applicant was in a position similar to that of a plaintiff or defendant in the Court below (2), and it does not seem to have been present to the mind of the Court of Appeal that there might be some difference, because Lord Esher, who delivered a judgment in which the other members of the Court concurred, said (3): "We must require the applicant to comply with those rules which relate to suing and defending in forma pauperis in the Courts of first instance, as fully as if they related also to appeals in this Court." A defendant, who has a judgment recorded against him in the Court below, by appealing against that judgment places himself in a position somewhat similar to that of a plaintiff, inasmuch as he is seeking to alter the existing state of things, and is not merely resisting an attack which is being made upon him, and therefore he cannot be permitted to proceed with his appeal in forma pauperis unless he produces an opinion of counsel that he has reasonable grounds for proceeding. If this were not so, a plaintiff who succeeded below might be exposed to the risk of being harassed by a number of appeals which were devoid of merit and in which he might not be able to recover any costs A defendant appealing must therefore be treated as being in the position of a plaintiff in the Court below, and cannot be permitted to proceed with his appeal in forma pauperis without first producing the opinion of counsel that he has reasonable grounds for proceeding with the appeal. The application will therefore be adjourned for that purpose.

Order accordingly.

Solicitors for plaintiff: *Merrimans & Thirlby.*

(1) [1893] 1 Q. B. 417.

(2) See the report in 68 L. T. 142, where it is stated that the appeal was against the decision of a registrar in bankruptcy refusing to annul the bankruptcy.

(3) [1893] 1 Q. B. at p. 418.

W. F. B.

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[IN THE COURT OF APPEAL.]

TUFF *v.* GUILD OF DRAPERS OF THE CITY OF LONDON.

Tithe—Tithe Rent-charge, Contract by Occupier to pay to Owner of Land Sums paid by him on Account of — Void Contract — Tithe Act, 1891 (54 & 55 *Vict. c.* 8), *ss.* 1, 2.

A contract made after the passing of the Tithe Act, 1891, by which an occupier of land agrees to pay to the owner thereof sums which the owner shall pay in respect of tithe rent-charge issuing out of the land, is void by reason of the provisions of the Tithe Act, 1891, s. 1, sub-s. 1.

So *held* by Vaughan Williams L.J. and Kennedy L.J., Buckley L.J. dissenting.

Judgment of Bray J. (following *Lord Ludlow* v. *Pike* [1904] 1 K. B. 531) affirmed.

Appeal from the judgment of Bray J. in an action tried by him without a jury as after mentioned.

The action was brought by the widow and executrix of one Charles Tuff against "the Master and Wardens and Brethren and Sisters of the Guild or Fraternity of the Blessed Mary the Virgin of the Mystery of Drapers of the City of London," to recover the sum of 594*l.* as being the balance due from the defendants to the plaintiff under or by virtue of an inventory and valuation made by valuers on September 30, 1911, of the tenant right and effects on a certain farm of which the defendants were the owners, whereby the sum of 976*l.* was found to be payable by the defendants to the plaintiff.

The defendants paid into Court the sum of 494*l.* 7*s.* 2*d.* and pleaded a set-off in respect of the sum of 99*l.* 12*s.* 10*d.*, as being the amount of certain tithe rent-charge paid by the defendants in respect of the hereditaments comprised in the said farm.

By lease dated March 26, 1902, the defendants demised the above-mentioned hereditaments to Charles Tuff for a term of ten years computed from September 29, 1900. The reddendum in the said lease was as follows: "Yielding and paying for the same during all the said term hereby granted unto the Fraternity the net yearly rent or sum of 264*l.*, without any deduction whatsoever except landlord's property tax on the rent reserved, by equal

quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year between the hours of 10 in the morning and 4 in the afternoon at Drapers' Hall in the City of London, and also the further yearly rent or sum of 20*l.* sterling for every acre of the meadow or pasture ground hereby demised which shall during the said term be ploughed, broken up, or converted into tillage, and so proportionately for any greater or less quantity than an acre, the first payment of such contingent rent respectively to be made on the first of the said quarterly days which shall happen next after every such ploughing, breaking up, or converting into tillage, and to continue thenceforth payable during the then residue of the said term, and also yielding and paying unto the Fraternity on the quarter day next following the day in every year of the said term on which the same shall be paid or payable by the Fraternity, and between the hours aforesaid, such further and other sums of money as they shall from time to time expend for the insurance of the said premises from loss or damage by fire as hereinafter mentioned, and for all tithe, or tithe rent-charge, or modus or other payment in lieu of tithe, without any deduction whatsoever"; and the lease contained, among others, the following covenant: "the lessee doth hereby covenant and agree with the Fraternity in manner following (that is to say) that he, the lessee, shall and will during the said term well and truly pay, or cause to be paid, unto the Fraternity at their Common Hall in the City of London the said yearly and other rents hereby reserved, without any deduction whatsoever except landlord's property tax on the rent reserved, at the times and in manner aforesaid."

Charles Tuff died on January 5, 1907. By his will he left all his property to the plaintiff, whom he appointed sole executrix of his will. The plaintiff continued to occupy the farm under the lease till the end of the term on September 29, 1910, and she afterwards continued to occupy it till September 29, 1911, on a yearly tenancy, as the defendants alleged, on the terms of the expired lease so far as applicable to such a tenancy. Her tenancy of the farm was determined on September 29, 1911, by notice to quit given by her. The sum of 99*l.* 12*s.* 10*d.* which the

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defendants sought to set off against the plaintiff's claim as aforesaid pro tanto was the amount which they had paid in respect of tithe rent-charge on the farm for the half-year ending October 1, 1911.

Bray J. held, on the authority of *Lord Ludlow* v. *Pike* (1), that a contract made by an occupier with the owner of land after the passing of the Tithe Act, 1891, for payment by the occupier to the owner of the amounts which he would have to pay in respect of tithe rent-charge was void by reason of the provisions of the Tithe Act, 1891, and consequently gave judgment for the plaintiff. (2)

J. R. Atkin, K.C., and *Courthope-Munroe*, for the defendants. Originally the tithe owner's remedy, if the tithe rent-charge was not paid, was by distress upon the land out of which the charge issued. A great deal of friction occurred in cases where occupiers, being Nonconformists, objected to having to pay tithe rent-charge. It was to remedy that state of things that the Tithe Act, 1891, was passed. That Act really deals only with the procedure for collecting the tithe rent-charge, not with the ultimate incidence of the charge. Sub-s. 1 of s. 1 of the Act makes the owner of the land liable to pay the charge to the tithe owner, and provides that any contract by the occupier with the owner for payment by the occupier of the tithe rent-charge, by which, it is contended, having regard to the object of the Act, must be meant payment to the tithe owner, shall be void. There is nothing in that sub-section to avoid a contract by which the occupier contracts to reimburse the owner in respect of payments of tithe rent-charge which he may have to make. The words "payable" and "payment" in s. 1, sub-s. 1, indicate payment of the tithe rent-charge to the tithe owner. Payment of a like amount to the owner of the land cannot correctly be spoken of as

(1) [1904] 1 K. B. 531.

(2) By s. 1, sub-s. 1, of the Tithe Act, 1891, "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable by the owner of the lands, notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void."

payment of the tithe rent-charge, which means a sum payable to the tithe owner. If the sub-section had been meant to have the effect contended for by the plaintiff, it would have provided that the tithe rent-charge should be payable "only" by the owner of the land. What sub-s. 1 avoids is a contract between the occupier and the owner that the occupier will pay the tithe rent-charge, i.e., to the tithe owner. This view of the sub-section is confirmed by sub-s. 2 of s. 1 and sub-s. 6 of s. 2. Sub-s. 2 of s. 1 provides that, in the case where at the date of the passing of the Act there is an existing contract by the occupier with the owner of the land for payment by the former of the tithe rent-charge, which in that case must mean for payment of the charge to the tithe owner, that contract shall no longer bind the occupier, but, instead thereof, he shall be liable to reimburse the owner for the sums which he may have to pay to the tithe owner in respect of tithe rent-charge. There seems to be no reason why the Act should render void a contract made subsequently to its passing which effects the same result as sub-s. 2 of s. 1 effects in the case where there is a contract between the occupier and owner existing at the date of the passing of the Act for payment of the tithe rent-charge by the occupier.

[VAUGHAN WILLIAMS L.J. The Legislature may have thought it unjust, where there was an existing contract by which the burden was undertaken by the occupier as between himself and the owner, to alter the incidence of the burden and throw it on the latter, and may therefore have excepted such a case from the operation of the main provisions of the Act.]

[They cited *Lord Ludlow* v. *Pike* (1); *Colbron* v. *Travers* (2); *Davies* v. *Fitton*. (3)]

Schiller and *Downes-Powell*, for the plaintiff. It is not correct to say that the Tithe Act, 1891, deals only with procedure for the collection of the charge and not with the incidence of the liability. Before the Act the tithe rent-charge was a charge on the land; there was no personal liability for payment of it; the remedy of the tithe owner for non-payment of the

(1) [1904] 1 K. B. 531. (2) (1862) 31 L. J. (C.P.) 257.
(3) (1842) 2 D. & War. 225.

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charge was to distrain upon the land after giving the notice required by 6 & 7 Will. 4, c. 71. Before 1891 it was common practice for a tenant to covenant that he would bear the charge. Under the Act of 1891 the incidence of the burden is to rest on the owner of the lands. If it had been intended only to deal with the procedure for collection of the charge, there would really have been no necessity for the provision in the latter part of sub-s. 1 of s. 1 for avoiding contracts by the occupier to pay the tithe rent-charge. It is a strained and unnatural construction of the words of that provision to say that "contract for payment of the tithe rent-charge" can only mean "contract for payment of it to the tithe owner." By the terms of the sub-section the word "payment" is not restricted to payment to any particular person, and it is not admissible to insert words which import such a restriction. The landowner may, no doubt, on letting the land subsequently to the passing of the Act, stipulate for a higher rent to cover the liability to pay the tithe rent-charge which has been thrown upon him, but he cannot validly contract with the tenant that the tenant shall pay to him as such the specific sums which he may have to pay in respect of tithe rent-charge. The effect of such a contract would be quite inconsistent with the whole object of the Act, which was to do away with the liability of the occupier in respect of tithe rent-charge, in order to prevent in the future the friction which had arisen in the past.

Courthope-Munroe for the defendants in reply.

VAUGHAN WILLIAMS L.J. The question in this case is whether part of this contract of lease is void under the provisions of s. 1, sub-s. 1, of the Tithe Act, 1891. The clause in question is as follows: "And also yielding and paying unto the Fraternity"—that is the landlords—"on the quarter day next following the day in every year of the said term on which the same shall be paid or payable by the Fraternity, and between the hours aforesaid, such further and other sums of money as they shall from time to time expend for the insurance of the said premises from loss or damage by fire as hereinafter mentioned, and for all tithe,

or tithe rent-charge, or modus or other payment in lieu of tithe, without any deduction whatsoever."

The sole question that arises upon the statute is whether, in the provisions of the first section, the statute is dealing merely with the mode of collection, or dealing with the incidence, of the tithe rent-charge. In my opinion it is dealing with the incidence of the tithe rent-charge, and not merely with the mode of collection. That is the conclusion at which Channell J. also arrived in *Lord Ludlow* v. *Pike*. (1)

I do not think that it is necessary to read at great length all the sections of the Act which have been cited, or to go in detail into all the arguments that have been based on their language. I think that really all I have to do is in the first instance to construe the words "payable by the owner of the lands." It has been urged that, when the statute says "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable by the owner of the lands," it does not say "payable 'only' by the owner of the lands," and that the word "only" not being used constitutes a difficulty in the way of adopting the construction of this Act that it deals with incidence and not merely collection of the charge. To my mind, the statute states by whom the tithe rent-charge is to be payable in the sense of indicating on whom the incidence of the charge is to lie: and I think that it is wholly unnecessary that the word "only" should be added in order to adopt that construction.

Then the section goes on to say, "and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void." It is argued that this provision only refers to the payment by the occupier's hand to the tithe owner. It was suggested that the collection of the charge by the tithe owner is to be by obtaining the money from the hand of the landlord, and that the section does not deal with the incidence of the charge. I can only say that I do not agree. I think that Channell J. was perfectly right, and, when one comes to deal with the provisions that follow s. 1, sub-s. 1, it seems to me that they bear out the construction which I have put upon that sub-section. Really,

(1) [1904] 1 K. B. 531.

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sub-s. 2 of s. 1 is an exception from the operation of sub-s. 1, and it is for that reason that sub-s. 2 begins with the words "Where the occupier is liable under any contract made before the passing of this Act to pay the tithe rent-charge." That means, I think, "Where the tenant before the passing of this Act has entered into a contract under which he will bear the incidence of the charge." It seems to me that this sub-s. 2 is intended to provide that, where there is such an existing contract made before the passing of the Act, then, whatever provisions are made in that contract for the incidence, amongst other things, of the burden, they shall remain operative. Sub-s. 3 appears to me to support that view. It says "Such sum shall be recoverable from the occupier by distress"—that is in the case of such a contract made before the passing of the Act—"in like manner as is provided by sections eighty-one and eighty-five of the Act of the session of the sixth and seventh years of the reign of King William the Fourth, chapter seventy-one, and the enactments amending those sections, and not otherwise." That is to say that, if there is an existing contract that the tenant shall pay the tithe rent-charge, and shall have no remedy over or right of recovery of the sum so paid by him against the landlord, that contract is to remain in force, so far as the incidence of the charge is concerned, and the sum paid by the landlord on account of tithe rent-charge is to be recoverable by distress upon the goods of the tenant, that is on his farming stock and other things. I see nothing in those provisions which militate against the view which I am taking. It is said that sub-s. 6 of s. 2 leads to a different conclusion. That sub-section runs thus: "Where the occupier of the lands out of which the tithe rent-charge issues is liable under any contract made before the passing of this Act to pay the tithe rent-charge"—that is liable as between him and his landlord—"and is consequently liable by virtue of this Act"—that is by virtue of the saving clause in sub-s. 2 of s. 1—"to pay the amount thereof to the owner of the lands, the owner of the lands shall serve notice of such liability on the owner of the tithe rent-charge, and thereupon, before an order under this section is made, there shall be such service on the occupier in addition to the owner as may be prescribed, and

a hearing of such occupier if he appears and desires to be heard." There again the sub-section only applies in the case of contracts made before the passing of the Act, which is, as I have said, in the nature of an exception from the provisions of sub-s. 1 of s. 1.

In regard to the judgment of Willes J. in *Colbron* v. *Travers* (1), it is perfectly true, as is pointed out in that case, and indeed as is pointed out by Channell J. in *Lord Ludlow* v. *Pike* (2), that there is nothing in the Act of Parliament which prevents an increase of rent by the landlord. The rent may be increased—that is, increased in general terms. The landlord upon whom this burden has been thrown by this Act of Parliament is entitled to charge a higher rent; but, if he provides in the lease that there is to be added to the rent in each year the amount which the landlord has had to pay to the tithe owner in the shape of tithe rent-charge, I am perfectly clear that that would come within the words of s. 1, sub-s. 1, "and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void." If the contract provides for such payment, it does not the less do so because it says that the amount of the charge shall be payable as rent. That I take it is what Willes J. meant when he said in *Colbron* v. *Travers* (3): "A landlord is entitled to all the rent which he can induce any person to pay; and if he does not in terms provide for the payment of the tax by a person by whom the Act of Parliament says it shall not be paid, but only provides for an increase of rent upon the increase of the burdens on his property, we think that this is not eluding the provisions of the Act." If I may say so, I entirely agree with that observation. The landlord is entitled to increase his rent, but he must not increase his rent expressly by the amount that has been paid by him in the shape of tithe rent-charge. If he does that, it seems to me that the case manifestly comes within the final words of s. 1, sub-s. 1, which provide that a contract for the payment of the tithe rent-charge by the occupier shall be void. For these reasons I think that the appeal should be dismissed.

(1) 31 L. J. (C.P.) 257. (2) [1904] 1 K. B. 531.
(3) 31 L. J. (C.P.) 257, at p. 259.

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BUCKLEY L.J. This is an appeal from the decision of Bray J., but he simply followed, as he was bound to follow, the decision of Channell J. in *Lord Ludlow* v. *Pike*. (1) In fact, though not in form, the appeal in this case is an appeal from the decision of Channell J. in *Lord Ludlow* v. *Pike*. (1)

The matter in dispute is this. Sect. 1, sub-s. 1, of the Tithe Act, 1891, contains the words: "any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void." Do those words mean any contract for the ultimate incidence of the pecuniary burden, or do they mean any contract for the payment to the tithe owner of that which he can demand as tithe rent-charge? In my opinion they mean the latter, and not the former.

At the time of the passing of the Tithe Act, 1891, the tithe owner could distrain on the land for the tithe rent-charge, issuing as it did out of the land, and could therefore take the goods of the tenant, if there was a tenant in occupation of the land. That produced friction and ill-feeling, particularly in the case of a tenant who happened to be a Nonconformist, and who resented the payment of tithe to the Established Church. The Act of 1891 was passed under those circumstances. Its principal object and effect is, I think, to be found in the provisions of s. 2. The substance of those provisions—I am not going to read them at length—is that an end is put to the then state of the law which enabled the tithe owner to distrain on the goods of the tenant. In its place sub-s. 1 of s. 2 provides that, if a sum due on account of tithe rent-charge is in arrear, the tithe owner can apply to the county court of the district in which the land is situate, and the county court, after hearing the owner of the land if he desires to be heard, can make an order that the sum be "recovered in manner provided by this Act, and tithe rent-charge as defined by this Act shall not be recovered in any other manner." The tithe owner has to come to the county court. The powers of the county court are as follows: If the landowner is in occupation—the case which is dealt with by s. 2, sub-s. 2—the Court can appoint an officer who,

(1) [1904] 1 K. B. 531.

subject to the direction of the Court, has the like powers of distraint as previously existed. If the land owner is in possession, therefore, there can be a distress against him, for in that case the goods taken will not be the goods of a tenant, but the goods of the land owner. Sub-s. 3, however, provides that "In any other case the order shall be executed by the appointment by the Court of a receiver of the rents and profits of the lands." The result, therefore, is that the tenant (not being the land owner) can never be attacked by the tithe owner, but, if the land owner is in possession, there can be a distraint as against him. And, if he is not in possession, a receiver can be appointed of the rents and profits of the lands. The tenant, however, can never be attacked at all. That was the principal object of the Act of Parliament, as I understand it.

Then the Act provided for cases where before the passing of the Act there had been entered into between the owner of the lands and the occupier of the lands a contract under which as between those two parties the occupier was to pay the tithe rent-charge. That case is dealt with by s. 1, sub-s. 2, and s. 2, sub-s. 6. What s. 1, sub-s. 2, does is this: it provides that, where contractually, as between the land owner and the occupier, the occupier is liable to pay the tithe rent-charge, the occupier shall cease to be bound by that part of his contract; that is to say he is no longer, although he is the occupier, to pay the tithe rent-charge to the tithe owner; "but he shall be liable to pay to the owner," that is the land owner, "such sum as the owner has properly paid on account of the tithe rent-charge." The effect of the statute, therefore, is to modify and alter the contract between the land owner and the occupier. The occupier is no longer to be liable as between those two parties to pay the tithe rent-charge, that is to say to pay the tithe owner. The owner of the lands is to pay the tithe owner, but, by virtue of the statute, the occupier is liable to pay to the owner of the lands the sum which the owner of the lands has paid to the tithe owner. Sub-s. 6 of s. 2 works that out, and provides this: "Where the occupier of the lands out of which the tithe rent-charge issues is liable under any contract made before the passing of this Act to pay the tithe rent-charge, and is consequently liable by

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virtue of this Act to pay the amount thereof to the owner of the lands," —that is by virtue of s. 1, sub-s. 2, which I have read— "the owner of the lands shall serve notice," and so on. That is the notice upon which the county court proceeds in order to give effect to the rights in that case as between the owner and the occupier. I pause upon that language. The language is this: "Where the occupier of the lands . . . . is liable under any contract . . . . to pay the tithe rent-charge." That means, I think, to pay the tithe rent-charge to the tithe owner. That seems to me to be made plain because the sub-section goes on thus: "and is consequently liable by virtue of this Act to pay the amount thereof to the owner of the lands." Those last words contrast payment of the tithe rent-charge with payment of a like sum to the landowner. From that sentence I think I am plainly entitled to read the words of the sub-section as meaning this— I am not inserting words, I am stating what, I think, is the meaning of the words used—"Where the occupier is liable under any contract made before the passing of this Act to pay the tithe rent-charge to the tithe owner, and is consequently by virtue of this Act" (s. 1, sub-s. 2) "liable to pay the amount thereof to the owner of the lands," then a certain result shall ensue. So far, therefore, it seems to me quite plain that in that sub-section "to pay the tithe rent-charge" means "to pay the tithe rent-charge to the tithe owner." The tithe rent-charge can in fact never be paid to any one but the tithe owner. A like sum can be paid, of course, to anybody. But the words "to pay the tithe rent-charge" are satisfied only by understanding them to refer to the liability existing in law to the tithe owner. The payment of the tithe rent-charge is the satisfaction of that liability, that is to say payment to the tithe owner, and nothing else. Any other payment is not a payment of the tithe rent-charge. It may be a payment of a sum of equal amount to the tithe rent-charge, but that is not a payment of the tithe rent-charge.

So far I have dealt with a case which is not the present case. What I have to deal with is the case under s. 1, sub-s. 1. Sect. 1, sub-s. 1, is as follows: "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable by the owner of

the lands." Those words seem to me perfectly plain. Tithe rent-charge is a legal obligation subsisting between somebody and the tithe owner, and not subsisting between any other parties. What those words say is that the tithe rent-charge, which is a legal obligation to the tithe owner, shall be payable to the tithe owner by the owner of the lands. So far I have it that the owner of the lands is to pay the tithe rent-charge to the tithe owner. Then the sub-section goes on: "notwithstanding any contract between him and the occupier of such lands"—that is to say, although as between the owner of the lands and the occupier of the lands contractually the occupier of the lands is to pay the tithe owner, that is not to be so in future. In future the only person who shall be liable to pay the tithe owner is the owner of the lands, and any contract to the contrary is to be rejected. Then come the words on which the question arises: "and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void." I understand those words to be words of qualification or explanation of the preceding words in the same sub-section. They mean that, as regards this payment to the tithe owner of the rent-charge which is payable to the tithe owner, any contract which the owner and occupier of the lands enter into for the payment of the tithe rent-charge being made by the occupier shall be void. The first words of the section are affirmative: the landowner shall pay: the succeeding words are negative: the occupier shall not. The payment referred to is in each case the payment of the tithe rent-charge, i.e., payment to the tithe owner. To make quite plain what I mean, I read the statute exactly in the same way as if there were introduced in each case after the words "payable" and "payment," respectively, the words "to the tithe owner." In doing that, I am not adding anything to the statute; I am giving effect to that which I say is the meaning of the statute. Putting those words in, I read sub-s. 1 of s. 1 as meaning this: "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable to the tithe owner by the owner of the lands, notwithstanding any contract made between him and the occupier of such lands,

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and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge to the tithe owner by the occupier shall be void." I have already given my reasons for this construction of the words. Sect. 2, sub-s. 6, and also s. 1, sub-s. 2, seem to me to make it quite plain that the meaning of the word "payment" in s. 1, sub-s. 1, of this Act of Parliament is "payment to the tithe owner."

I must add a word on what, in my humble judgment, would be the consequence of any other construction of the Act of Parliament. It would reduce the Act to an absurdity. So long as parties remain free to contract—and I hope they will always remain free to contract in any way which is not illegal or immoral—the incidence of a pecuniary burden like tithe rent-charge can always by apt means be thrown on the person upon whom the contracting parties think proper to throw it. The owner of the lands has to pay the tithe rent-charge, but he may very well, if he pleases, contract with somebody else that somebody else shall indemnify him against that payment. If the argument for the respondent were correct, it would lead to the result that, whereas it is in general competent to parties to contract that anybody's obligation shall be borne by somebody else, if somebody else chooses to undertake it, this Act of Parliament would have provided that this particular burden of tithe rent-charge shall not contractually be thrown on somebody else. That seems to me impossible. It would be easy to drive a coach and horses through such an enactment, because you could immediately by way of contract escape from that which the Act is supposed to have forbidden. I find no difficulty in giving the Act of Parliament a reasonable and consistent meaning. To my mind the words "payment of the tithe rent-charge" can and do—I was going to say in point of good sense, but certainly in point of law—mean only the satisfaction of a payment to which the tithe owner is entitled, and any other payment of a like sum is not a payment of the tithe rent-charge. I think that these words in s. 1, sub-s. 1, "payment of the tithe rent-charge," mean the satisfaction of the liability towards the tithe owner to make the payment due to him. What has

happened here is that, on a lease by the defendants to a tenant, the defendants have let certain premises to the tenant on a reddendum of so much money and a reddendum of such further sums as the lessors shall expend for tithe rent-charge. In my opinion that is a legal contract and is not affected in any way by s. 1, sub-s. 1, of the Act of 1891.

In these circumstances I am of opinion that the case of *Lord Ludlow* v. *Pike* (1) was wrongly decided and that this appeal should be allowed.

KENNEDY L.J. I have no doubt, after what has been said in the judgments of the other members of the Court, that there is a difficult question here, but I confess that it seems to me impossible to escape from the reasoning of Channell J. in the case of *Lord Ludlow* v. *Pike*. (1) That judgment was given a good many years ago and has since remained unchallenged until now, and it has been followed, and of course rightly followed, by my brother Bray in the present case.

I base my judgment upon the simple ground which is clearly stated in the judgment of Channell J., namely, that, when an Act of Parliament says in terms, as the Act of 1891 does here in the second half of sub-s. 1 of s. 1, that "any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void," one ought to read it in its natural meaning without the insertion of the terms which, it seems to me, it is necessary to insert in order to support the appellants' contention. I think that such an insertion of terms could only be made, if it plainly appeared to be in accordance with the intention of the Legislature as appearing from the other sections of the Act, or in order to render a section consistent with the other sections of the Act; and it seems to me impossible to say that it would not be inserting a limitation upon the general words used, if one were to read into that second part of the sub-section after the word "payment" words indicating payment to a particular person, namely, the owner of the tithe. Speaking for myself, I think that one of the great dangers which arise from such a course is that you are

(1) [1904] 1 K. B. 531.

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really framing what you think that Parliament ought to have said. In my opinion nothing has been shewn us in the rest of the Act which is inconsistent with the reading which I prefer, and which is in accordance with the judgment of Channell J. in the case of *Lord Ludlow* v. *Pike*. (1) Having heard what has been said on the subject, I need hardly say that I agree that there is a good deal in some of the other sections of the Act which may be made to work with the insertion of the words which have been suggested, but I do not agree that the other sections in any way demand that I should do that which Parliament has not done, namely, limit the meaning of the words "payable" and "payment" by the insertion of such words. I can conceive that, when Parliament says, in the first half of s. 1, sub-s. 1, "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable by the owner," the meaning might perhaps be what has been suggested, namely, that the words merely refer to the physical act of payment, and not to the incidence of liability, but I do not think that the natural meaning of the words in the second half of the sub-section, without straining, admits of such a construction; because, when Parliament says "and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void," I do not think the idea intended to be conveyed is merely that of payment by the hand of the occupier into the hand of the tithe owner. To say that the meaning is that there should be no contract for the hand of the occupier being the hand to deliver a sum of money to the tithe owner appears to me, I must confess, with all respect to a different opinion, a forced and unnatural way of construing words which are evidently meant to be an important declaration of something to affect the law, and which cannot, as it seems to me, be meant to refer, not to the liability for the payment, but merely to a contract that the amount of the tithe rent-charge shall be handed by the occupier to the tithe owner; and it is necessary for any other view than that which my brother Bray has adopted that the word "payment" should be restricted to a purely physical operation of paying and not refer

(1) [1904] 1 K. B. 531.

to any legal liability to pay. Of course it is quite true, as is illustrated by the opinion of that great judge Willes J., whose judgment in the case of *Colbron* v. *Travers* (1) has been cited, that a man may do things which produce a result different from that which would happen if a course apparently contemplated by an Act of Parliament had been followed, and yet not be held to have broken that Act. I think the phrase which has been used is a good one, that there is no obligation not to do what the Legislature has not really prohibited, and it is not evading an Act to keep outside it. In this case I do not at all mean to suggest, nor was it necessary for the respondent's counsel to argue, that a landlord might not practically get the incidence of this tithe rent-charge thrown upon his tenant by contracting for such a rent as would in his belief, though the tithe rent-charge may vary, shield him from any loss in respect to the payment of tithe rent-charge. He can do so. As a matter of fact in this particular document the rent and the liability to pay what is necessary to recoup the landlord who pays the tithe rent-charge are kept separate. The liability to pay the tithe rent-charge comes after rents which are specially described as such. First of all there is "yielding and paying the net yearly rent or sum of 264*l.*" on certain quarter days. Then there is what is described as a "further yearly rent or sum of 20*l.* sterling for every acre of the meadow or pasture ground hereby demised which shall during the said term be ploughed, broken up, or converted into tillage"; and the document having finished with rents proper altogether, and not referring to these sums as rent at all, goes on, "and also yielding and paying unto the Fraternity on the quarter day next following the day in every year of the said term on which the same shall be paid or payable by the Fraternity and between the hours aforesaid such further and other"—not rent, but—"sums of money as they shall from time to time expend for the insurance of the said premises from loss or damage by fire as hereinafter mentioned, and for all tithe, or tithe rent-charge, or modus or other payment in lieu of tithe, without any deduction whatsoever." In other words, this is a tenancy upon the terms of

(1) 31 L. J. (C.P.) 257.

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paying certain sums as rents, and imposing upon the tenant the further liability of paying at a certain date after the landlord shall have made certain payments those particular payments as such. I prefer the view that the words of s. 1, sub-s. 1, of the Act are intended to be used in what I think is their natural sense.

I do not think that I need discuss the case of *Colbron* v. *Travers* (1), which was cited to my brother Channell, but which he did not deal with in his judgment. He dealt with the judgment of Lord St. Leonards in the earlier case of *Davies* v. *Fitton* (2), which was cited to him, and shewed, and I think correctly shewed, that, so far as the language and opinion of Lord St. Leonards, in dealing with the Irish Act 2 & 3 Will. 4, c. 119, have a bearing on this case, they were adverse to the view of the appellants. My brother Channell did not deal with the judgment of Willes J. in the case of *Colbron* v. *Travers* (1) for the reason, I suppose, and it seems to me an ample and sufficient reason, that there was nothing in the decision which he gave which was affected by the law which was stated by Willes J. in that case.

I only say in conclusion that the provisions of the various sections of the Act which have been cited, relating to occupiers who are liable to pay the tithe rent-charge under contracts existing at the time of the passing of the Act, do not seem to me to help us to construe the main provision of the Act from which the case of an existing contract is, in conformity with justice, treated as an exception.

Appeal dismissed.

Solicitors for plaintiff: *Harwood & Pusey.*
Solicitor for defendants: *P. A. Nairne.*

(1) 31 L. J. (C.P.) 257. (2) 2 D. & War. 225.

E. L.

ROBERTSON, Appellant *v.* HAWKINS, Respondent.

1912
Oct. 31.

Dentist—Unregistered Person—Name or Title of Dentist—Description implying that Person is registered—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 3.

The appellant, who was in the employment of a county council, was medically examined by the council's medical officer, and received from him a document in which it was stated that, as his teeth were found to be defective, he should see a registered dentist, and that it would be necessary for him to obtain and forward to the medical officer a certificate that his teeth were in a satisfactory condition. At the foot of the document were the words "Please shew this form to the dentist, as only the certificate of a registered dentist can be accepted." The appellant went to the respondent, who practised dentistry, but who was neither a registered dentist nor a legally qualified medical practitioner, in the belief that he was a registered dentist, and had his teeth examined. The appellant handed him the above document, telling him that he required a certificate by a registered dentist. The respondent read the document and said that he had given hundreds of such certificates to the Post Office, and that he would give the appellant the certificate required when he returned on a subsequent day to have his teeth finished. The appellant did not return and no such certificate was given. The respondent did not at any time in writing or orally use the words "dentist" or "registered dentist" or state that he was a person specially qualified to practise dentistry:—

Held, that the respondent had taken or used a description implying that he was registered under the Dentists Act, 1878, contrary to s. 3 of that Act, and had therefore rendered himself liable to a penalty.

Case stated by a metropolitan police magistrate.

The respondent appeared before the magistrate upon a summons to answer an information laid by the appellant for that he the respondent on December 16 and 18, 1911, at 293, Gray's Inn Road, in the county of London, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, did unlawfully take and use the name or title "registered dentist" contrary to the statute. (1)

(1) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3: "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

"Any person who, not being registered under this Act, takes or

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At the hearing the following facts were proved or admitted:—

The appellant was an assistant schoolmaster under the London County Council. The respondent carried on the practice of dentistry at 293, Gray's Inn Road under the style or title of Williams' Artificial Teeth Institute, and was neither a registered dentist nor a legally qualified medical practitioner.

The appellant on December 8, 1911, went up for a medical examination by the London County Council's medical officer, and received the following document (hereinafter called the exhibit):—

"London County Council.

"As your teeth are found to be defective you should see a registered dentist. (1)

"When the necessary attention has been given, it will be necessary for you to obtain and forward to the medical officer (Education) a dental certificate shewing that your teeth are in a satisfactory condition.

"Will you please give this matter immediate attention as the dental certificate should be forwarded not later than 19th January, 1912.

"W. H. Hamer,
"School Medical Officer.

"Fitzalan House,
"Arundel Street, Strand, W.C.

"Please shew this form to the dentist, as only the certificate of a registered dentist (1) can be accepted."

The appellant, having read an advertisement in the *Evening News* of the respondent's establishment at Gray's Inn Road, went there in the belief that it was the place of a registered dentist. He went to the premises on December 12, 1911, and produced

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uses any such name, title, addition, or description as aforesaid shall be liable, on summary conviction, to a fine not exceeding 20*l.*; provided that nothing in this section shall apply to legally qualified medical practitioners."

Medical Act, 1886 (49 & 50 Vict. c. 48) s. 26: "It is hereby declared that the words 'title, addition, or description,' where used in the Dentists Act, 1878, include any title, addition to a name, designation, or description, whether expressed in words or by letters, or partly in one way and partly in the other."

(1) These words were made conspicuous by capitals and special underlining.

the exhibit to the operator, and on Saturday, December 16, 1911, he went to the premises by appointment and saw an operator, to whom he produced the exhibit. He paid a deposit of 1*l.* and had teeth extracted. On December 18 the appellant again went to the premises and was attended by the same operator as on December 16, and further teeth were extracted. On that day he asked for a provisional certificate from the operator, and he was taken into an adjacent room, where he saw the respondent, to whom he handed the exhibit. The respondent read the exhibit. The respondent did not himself at any time in writing or orally use the title or words "dentist" or "registered dentist," or state that he was a person specially qualified to practise dentistry. The appellant told him both by words and actions by pointing at the exhibit that he required a certificate by a registered dentist, and that the operator had promised him a provisional certificate on the previous Saturday, December 16. The respondent stated to the appellant that he had granted hundreds of such certificates to the Post Office, and that he would give the appellant the certificate required when he returned on January 19, 1912, to have his teeth fitted. The appellant left and did not return, and he had blood poisoning in the jaw. He wrote two letters asking for the certificate, which were not answered. The operator who attended the appellant was not a registered dentist nor a legally qualified medical practitioner.

The magistrate on the above facts held that there was no evidence in law that the respondent had taken or used the name or title of "dentist" or of "registered dentist" contrary to the provisions of the Act, on the ground that it was not proved by the appellant that there was a written or public use by the respondent of the title or name "dentist" or "registered dentist," there being no public holding out of the respondent as a dentist, and that a mere promise, even a fraudulent promise, did not amount to a public holding forth that he was a dentist.

The question for the opinion of the Court was whether the decision was right in law.

R. W. Turner, for the appellant. When the respondent stated to the appellant that he would give him the required certificate, that

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is, a certificate of a registered dentist, and that he had granted hundreds of such certificates to the Post Office, he took and used the name or title of registered dentist within the meaning of s. 3 of the Dentists Act, 1878. The magistrate seems to have thought that to bring a case within the Act there must be something in the nature of a public holding out of the person as a dentist or registered dentist. The Act, however, does not use the word "public." Nor does it require that the taking or using the name or title shall be in writing. Putting "dentist" or "registered dentist" on notepaper would be a taking or using within the meaning of the section. In order to bring a case within the section it is not necessary that the user should be frequent. If an unregistered person signs a letter once as "dentist" or as "registered dentist," or states that he is such on one occasion, in connection with his business, he is taking or using the name or title on that occasion. The magistrate was therefore wrong. [*Bellerby* v. *Heyworth* (1) was referred to.]

Hon. S. O. Henn Collins, for the respondent. There was no evidence of any taking and using the name or title of "registered dentist" on December 16; therefore the charge is that on one particular date, namely, December 18, the respondent took and used that name or title. There is no question of frequency of user. A mere promise or statement of intention on December 18 to give a certificate as a registered dentist on a future day, namely, on January 19, is not taking or using the name or title of registered dentist on the former day within the meaning of s. 3 of the Dentists Act, 1878. The dentist might become registered before the date for the fulfilment of the promise arrived, or he might procure a certificate from a registered dentist. A public holding out of a person as being capable of giving a certificate as a registered dentist on a future day is not a taking or using of the name or title of registered dentist on the day of the holding out. The section forbids the taking or using by an unregistered person of the name or title of "dentist" or any name, title, addition, or description implying that he is registered under the Act. A mere holding out is not sufficient. There must be a taking or using of the name, title, addition, or

(1) [1910] A. C. 377.

description, and the implication must come, not from the holding out, but from the name, title, addition, or description taken or used. There was no such taking or using in this case. The evidence that the respondent had said that on former occasions he had given similar certificates was not admissible evidence to shew an offence committed on December 18. The decision was therefore right.

R. W. Turner in reply.

LORD ALVERSTONE C.J. This case raises a question of some difficulty, and I express my opinion with doubt. Sect. 3 of the Dentists Act, 1878, provides that "a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act, unless he is so registered." It is clear that if the title "dentist" or "dental practitioner" is used, for instance, on a plate on the hall door underneath the unregistered person's name, an offence is committed against the Act. The respondent was charged for that he on December 16 and 18, 1911, not being then registered under the Act and not being then a legally qualified medical practitioner, unlawfully took and used the name or title "registered dentist" contrary to the Act. It seems to me to be unfortunate that the respondent was not charged under the subsequent words of the section which prohibit an unqualified person from taking or using "any name, title, addition, or description implying that he is registered under this Act." But upon the facts before the magistrate I do not think that the form of the summons ought to make any difference in this case. As I understand the facts the respondent did take a description implying that he was a registered dentist, that is, that he was registered under the Act. It is plain that every one concerned knew that the appellant required a certificate of a registered dentist. On December 18 he asked the operator, to whom the exhibit had been shewn, for a provisional certificate, and he was then taken into a room where he saw the respondent, who was shewn and read the exhibit. That document contained the words "Please

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shew this form to the dentist as only the certificate of a registered dentist can be accepted." When that paper was handed by the appellant to the respondent it appears to me that it was equivalent to asking him whether he was a registered dentist. As the case finds, the appellant told him both by words and actions by pointing at the document that he required a certificate by a registered dentist and that the operator had promised him a provisional certificate on the previous Saturday, December 16. The parties were discussing a certificate which could only be given by a registered dentist. The respondent must be taken to have answered that question in the affirmative. He stated to the appellant that he had granted hundreds of such certificates to the Post Office, and that he would give him, the appellant, the certificate required when he returned on January 19. In my opinion, both in the statement that he had given such certificates and in the statement that he would give him a certificate when he returned on January 19, the respondent did in fact say that he was a registered dentist. The difficulty I have felt is whether that comes within the words of s. 3 of the Act, "take or use any name, title, addition, or description implying that he is registered under this Act." It is said that merely telling one lie is not taking the name, title, or description, but when we find the respondent saying to a patient—and the natural inference from the statement in the case is that he had probably said the same to others—that he had given hundreds of such certificates—that is to say, certificates which could only be given by a registered dentist—it must mean that he was qualified to give the certificate which the appellant asked for, or in other words that he was a registered dentist, and therefore he took or used a description implying that he was registered under the Act. I have been impressed by the argument of the respondent's counsel that it did not amount to taking or using the name or title of registered dentist, as it merely amounted to telling the appellant a lie by stating that he could give a certificate as a registered dentist. That, however, seems to me to be too narrow a view of the facts as found by the magistrate. Nor do I think that the magistrate meant by using the word "public" something in the sense of a public utterance, because he contrasted it with "written."

He must have meant that there was not a sufficient holding out of the respondent as being registered under the Act to justify him in convicting. In my opinion the magistrate was wrong, and the case must be remitted to him with a direction to convict.

CHANNELL J. I am of the same opinion. I have felt great difficulty in understanding the meaning of the words in s. 3 of the Dentists Act, 1878, "take or use the name or title." The enactment mainly aims at prohibiting a person practising under a designation or title to which he is not entitled. The statute does not forbid an unqualified person acting as a dentist and practising dentistry. It does not make his acts illegal, but it forbids him assuming the name or title of "dentist" or of "dental practitioner," or any name, title, addition, or description implying that he is registered under the Act. The difficulty which I have felt is whether an unqualified person, by saying on one occasion that he is a registered dentist, can be said to "take or use the name or title of 'dentist'" within the meaning of the Act. I doubt whether the mere saying it on one occasion would be sufficient to bring him within the Act. But the case states that "the respondent stated to the appellant that he had granted hundreds of such certificates to the Post Office." If my Lord and my brother Avory are correct in the view which they take of those words, namely, that they mean that he had signed hundreds of such certificates as a registered dentist,—as to which I have felt some doubt—there is evidence against him that he had on those occasions assumed that title. I agree with my Lord that what happened on this occasion was equivalent to the respondent's saying that he was a registered dentist, and that statement which he was then making about himself, taken in connection with the evidence of what happened on previous occasions, would amount to an assuming of the name or title. There seems to be sufficient to bring the respondent within the Act, because there is evidence that he represented himself not only on this but also on other occasions to be a registered dentist, though the exact meaning of the section is a matter of considerable difficulty.

AVORY J. I am of the same opinion. The summons in this case appears to have been somewhat inartistically framed,

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Avory J.

because it charges that the respondent, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, unlawfully took and used the name or title of "registered dentist." Now no such expression occurs in s. 3 of the Dentists Act, 1878. As has been pointed out by my Lord, the case would perhaps have been more easy to decide if the summons had been properly framed under the second part of the section, namely, that the respondent took and used a name or description implying that he was registered under the Act. I come to the conclusion that this summons, though not framed in the very words of the section, was intended to be framed under the second part of the section, and I treat it as such for the purpose of my judgment, namely, as a summons charging the respondent with taking a name or description implying that he was registered under the Act. That being so, I should agree with the magistrate that a mere promise, even a fraudulent promise, does not amount to a public holding forth that he, the respondent, is a dentist or a registered dentist. But it is impossible to look at what the respondent said on December 18 about giving this particular certificate without also taking into account that he told the appellant that he had granted hundreds of such certificates. The natural meaning of that is that he had given hundreds of certificates as a registered dentist. If a person says that of himself, and that he is prepared then to do what only a registered dentist can do, namely, give the certificate, the proper inference which the magistrate ought to have drawn is that the respondent was at that time holding himself out as a person who was registered under the Act—in other words, taking to himself a description implying that he was registered under the Act. In my opinion that is the inference which the magistrate ought to have drawn.

Appeal allowed.

Solicitors for appellant: *Bowman & Curtis-Hayward.*
Solicitors for respondent: *Bloxam, Ellison & Co.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1912
Nov. 6, 7.

PROVIDENT CLOTHING AND SUPPLY COMPANY, LIMITED *v.* MASON.

Restraint of Trade—Agreement by Employee not to be engaged in Business the same as, or similar to that of, Employers—Area of Restriction, whether insufficiently defined—Reasonableness—Injunction.

By a contract for the employment of the defendant by the plaintiffs, a company, described in the contract as carrying on business "at London in the county of Middlesex," it was agreed by the defendant that he would not (inter alia), within three years after the termination of the employment, "be in the employ of any person or persons, firm or firms, company or companies, carrying on or engaged in a business the same as or similar to that of the" company "within twenty-five miles of London aforesaid where the company carry on business." In an action to enforce the before-mentioned agreement, it appeared from the evidence that it was not wider than was reasonably necessary for the plaintiffs' protection:—

Held, reversing the decision of a Divisional Court, that the agreement was not too vague or indefinite as regards the area of the intended restriction to be enforced by injunction.

APPEAL from the judgment of a Divisional Court (Pickford J. and Avory J.) on an appeal from the Clerkenwell County Court.

The action was by the plaintiffs, the Provident Clothing and Supply Company, Limited, for an injunction to restrain the defendant, who had formerly been a canvasser and collector in their employ, from committing a breach of clause 8 of the after-mentioned agreement.

By an agreement dated March 25, 1908, between the plaintiffs, who were therein described as carrying on "the business of a general clothing and supply company on the check and credit system at London in the county of Middlesex (amongst other places)," of the one part, and the defendant, William Milne Mason, described as "of Number 64, Tufnell Park Road, Islington, London aforesaid," of the other part, the plaintiffs agreed to employ the defendant in the capacity of a canvasser and collector until the engagement for services created by the agreement should be terminated as therein mentioned. It was provided by the agreement that the defendant's engagement might be terminated

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by either party giving two weeks' notice in writing of intention to terminate it. The defendant was to be remunerated for his services by a commission on sums collected by him for the plaintiffs as in the said agreement mentioned, and it was provided by clause 8 of the agreement that "In consideration of the premises the said William Milne Mason agrees that he shall not within three years after the termination of his engagement and service with the company be in the employ of, or be engaged in any manner whatsoever, whether on his own account, or as partner with, or agent, or manager, or assistant for any person or persons, firm or firms, company or companies, carrying on or engaged in the same or a similar business to that of 'the Provident Clothing and Supply Company, Limited,' carried on as aforesaid, or be engaged by, or assist or help, (either directly or indirectly) any person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping (either directly or indirectly) in the carrying on of the same or a similar business, or assist or help any one in the formation of such a business as aforesaid within twenty-five miles of London aforesaid where the company carry on business, or within twenty-five miles of any place where the said William Milne Mason shall have been employed by the company at any time during the continuance of this agreement."

The plaintiffs carried on a business the object of which was to enable persons of small means to procure clothing and other articles on what was described as the "check and credit system." The nature of their system was as follows: A person approved by the plaintiffs could become what was called a "member," and take up what was called a "share," to the amount of 10*s*., 1*l*., 2*l*., or more. A person so becoming a "member" received what was called a "check" as after mentioned for the amount of the "share." This check was received as cash by certain tradesmen, such as drapers, clothiers, bootmakers, jewellers, and the like, mentioned in a list furnished to the member, in payment for goods supplied to the member, the plaintiffs having made arrangements with those tradesmen by which the plaintiffs undertook responsibility to them for payment monthly of the

price of the goods supplied by them to members, less a certain agreed discount, which constituted the plaintiffs' profit. The member undertook to pay to the plaintiffs the amount of the check by instalments at the rate of 1*s.* in the pound per week, e.g., a 10*s.* check had to be paid up in regular weekly instalments of 6*d.* per week, a 20*s.* check at the rate of 1*s.* per week, a 2*l.* check at the rate of 2*s.* per week, and so on, and all orders had to be paid up in twenty weeks. New members got their checks when three weekly instalments had been paid, together with a small charge for poundage, or when eight payments had been made without poundage. Old members got their checks when one weekly instalment had been paid, together with a small charge for poundage, if their previous payments had been made regularly. The member was not obliged to spend the full amount of the check at one particular shop. He could divide the amount amongst several tradesmen until the face value of the check was exhausted, and in such cases the tradesman indorsed the amount spent at his shop on the back of the check, and returned it to the member for future use. The plaintiffs' registered office was in Bradford, but they had branch offices and districts all over Great Britain, employing as many as from 6000 to 7000 canvassers and collectors, who canvassed for members, and collected sums due from members. The plaintiffs had fifteen offices and districts in the metropolis, employing about 1000 canvassers and collectors. One of these districts was in Islington. These canvassers and collectors required a special education by the plaintiffs' manager to qualify them for the performance of their duties. They received printed rules to be observed by them and written and oral instructions as to the mode in which persons were to be canvassed for the purpose of inducing them to become members.

The defendant was never employed by the plaintiffs anywhere but in their Islington district.

The defendant was dismissed by the plaintiffs on May 16, 1911. After leaving their service, he entered into the service of the "People's Supply Company," who carried on business at 315, Upper Street, Islington. The plaintiffs thereupon brought the action in the county court as above mentioned. At the trial

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in the county court no witnesses were called for the defendant, and it did not appear to have been disputed that the business carried on by the People's Supply Company was similar to that of the plaintiffs, the only defence set up for the defendant being that clause 8 of the above-mentioned agreement was too vague and ambiguous to be capable of being enforced by injunction, and that it was wider than was reasonably necessary for the protection of the plaintiffs' interests, and was accordingly void as being unduly in restraint of trade.

The county court judge overruled these contentions and gave judgment for an injunction against the defendant.

The defendant appealed to the Divisional Court on the grounds that the county court judge was wrong:—

(1.) In refusing to hold that the terms of clause 8 of the said agreement were too vague and ambiguous to be capable of being enforced by injunction.

(2.) In refusing to hold that the said clause 8 was wider in its terms than was reasonably necessary for the protection of the plaintiffs' interests, and that the same was accordingly void as being unduly in restraint of trade, and contrary to public policy.

In the Divisional Court the plaintiffs' counsel abandoned any claim to an injunction based on the terms of the latter part of clause 8 of the agreement, namely, "within twenty-five miles of any place where the said William Milne Mason shall have been employed by the company at any time during the continuance of his engagement."

The Divisional Court allowed the appeal on the ground that an injunction should be in such terms that the defendant should know from what actions or what conduct he is restrained, and that the meaning of the words "within twenty-five miles of London aforesaid where the company carry on business" was too vague and uncertain to admit of an injunction being framed on such terms.

Waugh, K.C. (*H. Newell* with him), for the plaintiffs. Assuming that the agreement in this case is prima facie in restraint of trade, the onus of shewing that it is not reasonable

lies on the defendant: *Rousillon* v. *Rousillon* (1); *Underwood & Son, Ld.* v. *Barker*. (2) The evidence does not shew that the agreement here was unreasonable. In *Rousillon* v. *Rousillon* (3) Fry J. cited from the judgment of the Court of Queen's Bench in *Tallis* v. *Tallis* (4) the following passage as expressing the law on the subject: "And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold the contract void." In *Mills* v. *Dunham* (5) Lindley L.J. says: "I think that Mr. Levett's contention that you are to treat a restraint of trade as prima facie bad and throw upon the person supporting it the onus of shewing that it is reasonable, is introducing a wholly unsound principle into the construction of documents." The defendant is seeking to put a restraint on the freedom of contract, and, therefore, according to the authorities, it lies on him to shew that it is necessary to do so for the purposes of freedom of trade.

It is contended by the defendant that the description "London in the county of Middlesex" is too vague as regards the area indicated. In a business like the plaintiffs' the business is carried on over a certain area where they have customers. The Court below were wrong in saying that the plaintiffs carried on business at fifteen points in Greater London, and that therefore fifteen radii of twenty-five miles would have to be measured before defining the prohibited area. It has been held in *Mallan* v. *May* (6) that when London is spoken of, prima facie it means the city of London, which is within the area in which the plaintiffs' canvassers canvass and collect.

Rawlinson, K.C., and *J. B. Matthews*, for the defendant. The judgment of the Divisional Court is right on the ground therein given, and on the wider ground that the restraint was greater than was reasonably necessary for the protection of the plaintiffs.

(1) (1880) 14 Ch. D. 351.
(2) [1899] 1 Ch. 300.
(3) 14 Ch. D. at p. 365.
(4) (1853) 1 E. & B. 391, 412,
(5) [1891] 1 Ch. 576, at p. 586.
(6) (1843) 11 M. & W. 653; (1844) 13 M. & W. 511,

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The plaintiffs are seeking to exclude the defendant from the whole of the metropolis. That is prima facie unreasonable, and therefore the burden lies upon them of shewing the reasonableness of such a restriction. Twenty-five miles from London embraces all Greater London and several large towns.

The word "London" does not connote any definite place. There is the city of London and there are statutory areas such as those constituting the county of London and the area of the Metropolitan Water Board. But there are no legal boundaries of "London" in the popular sense. As London grows from day to day, so this covenant would from day to day stretch and grow more elastic. It is a pure matter of opinion where London begins and where it ends.

An injunction in the terms of the agreement would be bad for vagueness. It would leave it quite uncertain whether the measurement of the twenty-five miles is to be from the plaintiffs' place of business in London or from the extremity of London. The Court will not grant an injunction that is not clear and definite and easily understood by the person against whom it is granted. A restriction based on the twenty-five-mile limit is much wider than is necessary to protect the plaintiffs. No possible harm can be done to the plaintiffs if the defendant is prevented from canvassing people whom he has canvassed before for them. A two-mile radius would be ample. [They cited *Dowden & Pook, Ld.* v. *Pook.* (1)]

Waugh, K.C., for the plaintiffs in reply, cited *Badische Anilin und Soda Fabrik* v. *Schott.* (2)

VAUGHAN WILLIAMS L.J. In this case I confess that I have felt considerable doubt whether it was shewn that the company into whose service the defendant entered after his dismissal by the plaintiffs are carrying on a business similar to that of the plaintiffs, or whether really they are merely carrying on a business in a similar mode to that in which the plaintiffs carry on their business. There was, however, no appeal by the defendant on that point. It was, I understand, common ground, and was not denied, that the company into whose service the defendant

(1) [1904] 1 K. B. 45. (2) [1892] 3 Ch. 447.

entered carry on a business similar to that of the plaintiffs within the meaning of clause 8 of the agreement of March 25, 1908. The plaintiffs appear to have invented a new mode of doing business, the object of which was to enable poor people, who have not ready money to pay down for their clothing, to get clothing delivered to them immediately because the plaintiffs undertake the responsibility for payment of the price. They do not advance money to the poor people themselves, but they do what comes to the same thing; they give them what are called checks, upon production of which to the tradesman, he will hand over the goods immediately; the plaintiffs pay for them; and to the extent to which the money then subscribed by the shareholder is not sufficient to recoup to the plaintiffs the amount which they have to pay to the tradesman, the balance is advanced out of the pocket of the company. In my judgment the mere fact that another company carried on its business upon that system would not constitute the carrying on of a similar business within the meaning of clause 8, but only the carrying on of a business in a similar manner. I must assume, however, for the purposes of this appeal that the company into whose service the defendant has entered are carrying on a similar business to that of the plaintiffs, and that there was evidence to that effect. That being so, I must say that, with regard to the ground upon which the Divisional Court decided this case, namely, that the agreement contained in clause 8 is too vague, because it does not describe the point from which the measurement is to be taken with sufficient certainty, I cannot agree with their view. Neither do I think that there is any serious difficulty in drawing up the injunction in the terms of the first portion of clause 8, namely, that which relates to carrying on the same or a similar business within "twenty-five miles of London where the company carry on business"; and I understand that the claim for an injunction is now limited to such an injunction. But for the admissions made below, I should have had a difficulty in granting this injunction, but, as I have said, it is common ground, having been really admitted below, that the business which the company into whose service the defendant has entered carry on in the neighbourhood where the plaintiffs carry on business is the same

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as, or similar to, "the business of a general clothing and supply company on the check and credit system." That having been admitted, I agree that an injunction in the form which I have mentioned ought to be granted here, but I should not have been prepared to grant such an injunction in a case where the matter complained of merely was that the defendant had entered into the service of a company who carry on their business in a particular manner similar to the mode in which the plaintiffs carry on their business. On the grounds which I have stated I think that this appeal should be allowed.

BUCKLEY L.J. This action was brought in a county court to enforce the restrictive agreement contained in clause 8 of the defendant's agreement of service dated March 25, 1908. The learned county court judge granted an injunction. The defendant appealed to the Divisional Court, and by his notice of appeal he founded his appeal on the ground, first, that clause 8 was too vague and ambiguous, and, secondly, that it was wider in its terms than was reasonably necessary for the plaintiffs' protection. The only questions, therefore, raised by this appeal are, first, whether the agreement is too vague and ambiguous, and, secondly, whether it was not reasonably necessary.

The facts, as proved before the learned county court judge, are these. The defendant was employed under this agreement of March 25, 1908, and he was dismissed on May 16, 1911. Having been so dismissed, he took occupation with another company as to whose business there was no dispute between the parties that, and the appeal was opened upon the footing that, it was a similar business to that of the plaintiffs within the meaning of clause 8 of the agreement. As can be seen by reading the notice of motion in the Divisional Court, there was not raised before that Court any contention that the business was not a similar one, and we must take it to have been so. The nature of the plaintiffs' business is this. The plaintiff company is one which invites artisans, and other persons in a comparatively humble station in life, to become members of the society. If they become members, they take what is called a "share"; it may be ten shillings, or one pound, or two pounds, or more.

Supposing, for example, that a member takes a 1*l.* share, he pays instalments of 1*s.* a week, and, if he is an old member, as soon as he has paid one such instalment, or, if he is a new member, as soon as he has paid three such instalments, he receives what is called a "check," that is a voucher, upon production of which to one of certain named tradesmen he can get twenty shillings' worth of goods. He does not pay money; he hands over in payment his check. He may, if he likes, only get goods to part of the amount of the check from a particular tradesman, and, if he does so, the tradesman indorses on the back of his "check" the amount which he has taken. As between him and the tradesman, he has then paid for the goods. The company become debtor to the tradesman for the amount; they pay the tradesman for the goods; and, as between the tradesman and the company, the former allows some 15 or 20 per cent. discount, and out of that the company make their profit. The business, therefore, which the company carry on may be described as that of middlemen, or financiers who finance people in a small way. They do not deal in goods. For a money consideration, and a promise to pay future instalments, they allow members to pledge their credit with tradesmen. In order to obtain members they employ canvassers. The evidence is that they employ between six and seven thousand canvassers all over the country. In London they have some fifteen different districts, and employ something like one thousand canvassers. They carry on this business, therefore, very largely. Each canvasser is employed in a district. The defendant was employed by the plaintiffs in Islington, and served in Islington; and, as far as appears, he never served anywhere else. When he was dismissed, he took employment with another company, who carry on their business at 315, Upper Street, Islington, in the immediate neighbourhood of the place where the plaintiffs had employed the defendant. The company into whose service the defendant so entered carry on a similar business to that of the plaintiffs. That, as I have said, is not disputed. There was, therefore, a plain breach of the agreement contained in clause 8, if it be a legal agreement. Whether it is a legal agreement depends on two questions: (1.) whether it is wider than is

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reasonably necessary for the plaintiffs' protection; (2.) whether it is too vague. Those are the only two questions before us.

First I will take the question of reasonableness. With regard to that the contention for the defendant seems to me an impossible one. The county court judge had to find the facts, and the facts as found by him bind us. It is, no doubt, the case that, after all the facts have been found, there may arise, as a question of law, the question whether those facts shew that the agreement is not reasonable in law, but, as regards all the facts, the county court judge is the arbiter between the parties. The nature of the facts proved before the county court judge in this case was as follows. In order to secure success in this particular class of business, the plaintiffs' canvassers are supplied with certain materials in the shape of special forms, and are instructed as to the proper mode of address for the purpose of securing the confidence of customers, and as to the particular advantages of the "check and credit" system upon which they are to dwell. The canvassers become, to a certain extent, specially instructed agents. There is evidence, upon the county court judge's note, that the plaintiffs had instructed the defendant in that way, and a witness for the plaintiffs appears to have said that, this being so, the defendant might, if he entered the service of another similar company, interfere with the plaintiffs' business. Upon these facts the learned county court judge could, it seems to me, reasonably find, and, inasmuch as he granted an injunction, he must, I think, have found, that the defendant, as the paid servant of the plaintiffs, had been so dealt with by his employers as that he had become a particular sort of expert in this form of business, and that, as such, he was in a position to interfere with the plaintiffs' business. In these circumstances I think the agreement was reasonable in point of law.

That being so, there is left the only other point, which is the only point on which the Divisional Court decided, namely, as to whether this agreement is too vague and indeterminate to be enforced. The language of the agreement contained in clause 8 is this: the defendant is not to do any of certain

acts, which are described at great length, "within twenty-five miles of London aforesaid where the company carry on business, or within twenty-five miles of any place where the said William Milne Mason shall have been employed by the company at any time during the continuance of this agreement." Inasmuch as the defendant was never employed during the continuance of the agreement anywhere but in Islington, the defendant's counsel has said that the second alternative may be disregarded, and we have not been asked to grant any injunction in respect of the latter words of the clause. I therefore drop those words, and deal only with the words "within twenty-five miles of London aforesaid where the company carry on business." The word "aforesaid" there, I suppose, sends one back to the initial words of the agreement, by which I find this company described as carrying on business on this system "at London in the county of Middlesex," amongst other places, so that I suppose I am to read clause 8 as equivalent to "within twenty-five miles of London in the county of Middlesex where the company carry on business." We are told that this is indefinite, and that there is no such place as "London in the county of Middlesex." That seems to me to be a bold statement. I agree that, if one wanted to identify the exact physical boundaries of the place described as "London in the county of Middlesex," one might be in some doubt. It is true that "London" as generally understood is not all within the county of Middlesex. A great part of it is within the county of Surrey. Then it is said as regards the meaning of the word "London" that there is the city of London, there is the area of the Metropolitan Water Board, there is the county of London, and so on, and that it is impossible to tell from the agreement which of these is meant. Let me take by way of illustration a case of this sort. There is, I believe, no such place as "Bayswater" as a place with clearly defined limits. If any one were asked to define the limits of "Bayswater," he might have a difficulty as to where exactly the boundary line ought to be drawn. But we all know well enough what we mean by "Bayswater," popularly speaking. If I found a covenant, reasonable for the protection of an employer, and properly

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limited in point of time, that a person would not open a shop of a particular kind in Bayswater, I should have no hesitation, myself, in granting an injunction to restrain him from opening a shop of that kind in Bayswater, and, if and when an application was made to commit for breach of that injunction, there would be no difficulty in receiving evidence for the purpose of shewing what was meant by "Bayswater," although there are no territorial limits which can be actually stated defining it physically. It would be a matter of evidence. If people contract with reference to "Bayswater," they must be taken to mean something by that term. What they mean is to be proved by evidence, and evidence might be given, I conceive, to shew what was "Bayswater" for the purposes of the agreement. I feel no greater difficulty myself as to clause 8. If we grant, as we propose to grant, an injunction in the terms of this agreement, restraining the defendant from doing the acts therein mentioned "within twenty-five miles of London where the company carry on business," and, if he does some act which is complained of as being a breach of that injunction, and there is a motion to commit him for contempt, evidence can be taken as to what "London" means within the meaning of that phrase. This restrictive agreement is perfectly plain in its terms: it is limited in point of time, which of course is one great factor for the purpose of determining whether such agreements are legal or not: it is limited in point of space in such manner that it is not wider than is reasonably necessary for the protection of such a business as the plaintiffs carry on. If so properly limited in time, properly limited in space, and expressed so as not to be too indefinite to be enforced, then it is a contractual obligation which this Court will enforce by injunction. I think that an injunction ought to be granted in the terms of clause 8 down to and including the words "twenty-five miles of London aforesaid where the company carry on business." Three times in the clause the words "the same or a similar business" are to be found. In the order those words ought to be replaced by the words of the agreement which they express, namely, "in any business the same as, or similar to, the business of a general clothing and supply company on the

check and credit system." I think this appeal should be allowed, and that injunction granted.

KENNEDY L.J. I am of the same opinion. We have only to consider the two points which have been raised by this appeal, and I desire to express no opinion whatever on the point which has been to some extent suggested, as to whether the business carried on by the company into whose service the defendant entered, after he left the plaintiffs' service, was a similar business to that of the plaintiffs. The learned county court judge must have found that the businesses were similar, and no appeal on that point was ever raised in the Divisional Court, nor is it before us, and I propose to say nothing on a point which I have not to decide.

With regard to the other two points, namely, whether the agreement is too vaguely and ambiguously expressed to be enforceable, and whether it is wider than is reasonably necessary for the protection of the plaintiffs, or in other words whether it is unreasonable as being in restraint of trade, the judgments already delivered appear to me really to cover the whole ground. The objection as to vagueness does not seem to me to raise a substantial point. The other point with regard to the question of reasonableness is a point which is always one of some difficulty in such cases. The learned judge has got to draw the line between that which is reasonable and that which is unreasonable, having regard to the nature of the particular business and the position of the contracting parties on the one hand, and to the interests of the public and of freedom of trade on the other hand, which is always a somewhat difficult task. In this particular case, however, having regard to the nature of the plaintiffs' business, the question does not appear to me to present much difficulty, because the restriction involved certainly seems not to be wider than is reasonably necessary for the plaintiffs' protection, considering the danger that there is that a man who has learnt what was called in the argument the "trick" of this business, and who has been dealing for a considerable time with the customers of the plaintiffs in the district, may be able, from the knowledge which he has acquired in reference to the business which he has just

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left, to take over their customers to a competing business. I think that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Jaques & Co., for John Hodson Richardson & Son, Bradford.*

Solicitors for defendant: *Langhams.*

E. L.

1912
Nov. 12.

WHITE *v.* BOWN.

Parliament—Franchise—Ownership—Receipt of Rents and Profits—Direction to pay Rents to Third Person—Case stated by Revising Barrister—Signature by Registration Agent on behalf of Claimants—Representation of the People Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 26.

By s. 26 of the Representation of the People Act, 1832, it is enacted that ". . . . No person shall be . . . . registered . . . . in respect of his estate or interest in any lands or tenements as a freeholder . . . . unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use" (for a period prescribed).

Four brothers who were freeholders of certain houses authorized their trustee to send the rents of the houses to their father during his life, instead of dividing them amongst themselves:—

Held, that the freeholders were in receipt of the rents of the houses within the meaning of the section and were therefore entitled to be registered as voters in respect of their interest as freeholders.

At the end of a case stated by a revising barrister there was the following statement:—

"I for myself and on behalf of the other persons who are interested as appellants in this matter and whose names are hereunder written in Schedule Number I. do appeal against this decision.

"(Signed) Ernest L. White, Appellant."

The names of the claimants appeared in the schedule which was written below the statement. It appeared that Ernest L. White was a registration agent, and that he was not personally interested in the appeal.

Held, that although the case ought to have been signed by the parties really interested, and not by an agent, the statement was equivalent to the agent saying that the persons whose names appeared in the schedule, i.e., the claimants, were appellants and had authorized him to sign on their behalf, and that therefore the Court had jurisdiction to entertain the appeal.

CASE stated by the revising barrister for the Westbury or Western Division of the county of Wilts.

At a court held before the revising barrister, the appellant duly claimed that the names of the four claimants hereinafter set out should be included in the parliamentary list of ownership voters for the parish of Trowbridge (southern portion.) The claims were as follows :—

Name of Claimant.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Porter, Alfred Avons	West Bank Rd., Edge Lane, Liverpool	Share of freehold houses	Newtown and 1, Bond St., Trowbridge
Porter, Arthur Joseph	West Bank Rd., Edge Lane, Liverpool	Share of freehold houses	Newtown and 1, Bond St., Trowbridge
Porter, Ernest William	West Bank Rd., Edge Lane, Liverpool	Share of freehold houses	Newtown and 1, Bond St., Trowbridge
Porter, Sidney E.	West Bank Rd., Edge Lane, Liverpool	Share of freehold houses	Newtown and 1, Bond St., Trowbridge

The claims were duly objected to.

There was no evidence called before the revising barrister, but he was informed by both parties that the facts of the case were agreed between them as follows. Some years ago one Avons left the houses which formed the qualifying property to his daughter, the mother of all four claimants. At her death it was believed by all parties that the father took a life estate in these houses, and the trustee for some years paid the rents to him. It was not until last year, when his claim to an ownership vote was objected to, that the probate was looked at, and it was then discovered that he had no life estate and that the property had passed to his children. Thereupon all the children, desiring that their father should receive the annual income of the property for his use during his life, verbally authorized the trustee to send the money direct to him as before, instead of dividing it amongst themselves. There was no statement in the case as to when this took place, but the Divisional Court assumed that it was at least six months before July 15, 1912. There was no dispute that each share was of sufficient value, and the revising barrister was told that the father had stated his willingness to refund the shares he had received and to allow any child who wished it to have his share paid to him by the trustee.

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It was objected that in these circumstances the four claimants could not be registered in respect of their estate as freeholders, as they had not been in the actual possession thereof or in receipt of the rents and profits thereof for their own use within the meaning of s. 26 of the Representation of the People Act, 1832.

It was contended by the appellant that there was a constructive receipt by the claimants of the rents and profits of the houses for their own use; that physical possession of the moneys was unnecessary to constitute a receipt; and that there had been as much a receipt by the claimants as if they had personally received the cheques and had given them away again to their father or others. It was further contended that, if the payment to the father was a breach of trust, the trustee might be liable for that in law, but that that could not affect the right of the beneficiaries to be registered.

The revising barrister held that the words of s. 26 of the Representation of the People Act, 1832, precluded his adopting the contention of the appellant, and he therefore disallowed the four claims.

Below the signature of the revising barrister to the case was the following statement:—

"I for myself and on behalf of the other persons who are interested as appellants in this matter and whose names are hereunder written in Schedule Number I. do appeal against this decision.

"(Signed) Ernest L. White,
"Appellant.

"*Schedule Number I.*
Porter, Alfred Avons.
Porter, Arthur Joseph.
Porter, Ernest William.
Porter, Sidney E."

By s. 26 of the Representation of the People Act, 1832, it is enacted that ". . . . No person shall be . . . . registered . . . . in respect of his estate or interest in any lands or tenements as a freeholder . . . . unless he shall have been in the actual

possession thereof, or in the receipt of the rents and profits thereof for his own use, for six calendar months at least next previous to the last day of July in each year . . . ."

By s. 7 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), as amended by s. 12 of the Registration Act, 1885 (48 & 49 Vict. c. 15), the period of six calendar months, instead of being computed by reference to the last day of July, is to be computed by reference to the fifteenth day of July. It appeared that Ernest L. White was a registration agent, and that he was not personally interested in the appeal.

Percival Clarke, for the appellant. The direction to the trustee by the claimants that the rents should be sent by him to the father amounted to a receipt by the claimants of the rents. It is analogous to the case of a person who directs that a sum due to him shall be paid to his banker or to a creditor. It is not necessary that the claimants should have been in physical receipt of the rents.

As to the nominal appellant being White, who was a registration agent, he stated in the case that he signed it on behalf and with the authority of the claimants. That statement is sufficient to give the Court jurisdiction to entertain the appeal. [Rogers on Elections, 17th ed., vol. i., p. 355, was referred to.]

The respondent did not appear.

DARLING J. In this case the only question before the Court is whether for six calendar months at least previous to July 15, 1912, the claimants have been in receipt of the rents and profits of the houses for their own use within the meaning of s. 26 of the Representation of the People Act, 1832. For a considerable time a misapprehension existed and it was thought by all parties that the father of the claimants had a life estate in the houses and was entitled to the receipt of the rents, and for some years the trustee paid the rents to him. Some time in 1911 it was discovered that this was a mistake and that the father had no life estate and was therefore not entitled to receive the rents. But as the children desired that their father should receive the rents during his life, they authorized the trustee to pay them direct

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Darling J.

to him as before, instead of dividing them amongst themselves. For the purposes of our judgment we assume that the authority was given to the trustee at least six months before July 15, 1912. On these facts we are of opinion that there was a receipt of the rents for their own use by the children who were entitled to them. The case is very inartistically stated, the date when the verbal direction to the trustee was given not being mentioned. But I think the case contains a sufficient statement. We gather that the direction was given soon after the revision court was held in 1911. The arrangements the claimants made for the payment of the rents to their father are sufficient to entitle them to be placed upon the register of voters.

Another point is that the persons who were entitled to be upon the register, namely, the claimants, are not parties to the appeal. The case is only signed by Ernest L. White as appellant and he has no right to be an appellant. However he has signed the appeal "for myself and on behalf of the other persons who are interested as appellants in this matter and whose names are hereunder written in Schedule Number I.," and the claimants' names appear in the schedule. I think we may indulgently regard that as saying "they are appellants and they authorize me to sign on their behalf." At the same time I wish to state that the case ought not to have been signed in that way. The appeal will be allowed.

CHANNELL J. I am of the same opinion. The main difficulty I have felt is as to whether we have jurisdiction to entertain the appeal, as I have doubted whether the claimants are appellants in the case. The person mentioned as the appellant must be really interested in the appeal and not an agent. But as there is the name "Ernest L. White" signed as appellant and he states that he so signs on behalf of himself and the other persons whose names appear in the schedule, and the names in the schedule are those of the claimants, I think his signature on their behalf is sufficient and that we may entertain the appeal.

As to the rents having been in law received by the claimants I feel no doubt whatever. The father was supposed to be tenant for life of the property, but it was discovered that that was a

mistake, and the claimants thereupon instructed the trustee to pay the rents to him. That was equivalent to the claimants who were entitled to the rents receiving them and then handing them over to their father. The appeal will be allowed.

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AVORY J. concurred.

Appeal allowed.

Solicitors for appellant: *Milner & Bickford, for Ernest J. White, Trowbridge.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1912

Nov. 13.

MASON (TRUSTEE OF CHETWYND, A BANKRUPT) *v.* BOLTON'S LIBRARY, LIMITED.

Bankruptcy—Act of Bankruptcy—"Goods held by sheriff for twenty-one days"—Interpleader Summons—Consent Order for Sale of Goods—Title of Trustee in Bankruptcy to Proceeds of Sale—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Rules of the Supreme Court*, 1883, *Order* LVII., *rr.* 1, 8, 11, 12.

The Bankruptcy Act, 1890, s. 1, enacts that a debtor commits an act of bankruptcy if his goods are seized in any civil proceeding in the High Court and are "held by the sheriff for twenty-one days" provided that, where an interpleader summons is taken out in regard to the goods seized, the time elapsing between the date at which the summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days.

On May 20, 1911, the sheriff seized the goods of a judgment debtor under a writ of fi. fa., and on June 9 (the twentieth day after the seizure) took out an interpleader summons which was heard on June 12, when, the third party claim being admitted, an order was made by consent that the sheriff should sell and pay the amount of the claim and his costs of the execution. The sheriff on the next day sold the goods. The judgment debtor having become bankrupt, his trustee in bankruptcy claimed the proceeds of sale from the judgment creditors on the ground that the judgment debtor had committed an act of bankruptcy by reason of the sheriff having been in possession for twenty-one days:—

Held, that, inasmuch as the sheriff had not been ordered to withdraw and no interpleader issue had been ordered on the interpleader

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summons, the proviso to s. 1 of the Act of 1890 had no application, and that the enacting part of the section remained unimpaired.

Held, therefore, that the act of bankruptcy was committed and that the trustee in bankruptcy was entitled to the proceeds of the sale.

Decision of Phillimore J. [1912] 2 K. B. 520, reversed.

APPEAL from a decision of Phillimore J. (1)

On May 18, 1911, the defendants, who were judgment creditors of Florence Chetwynd, a widow, for the sum of 124*l.* 17*s.* 8*d.* and costs, issued a writ of fi. fa. out of the King's Bench Division, and on May 20 the sheriff seized the goods of the judgment debtor at Durtnall's repository, Brighton. Thereupon Maple & Co., Limited, claimed a lien on the goods for 70*l.*, and on June 9 the sheriff took out the usual interpleader summons requiring all parties to attend in chambers on June 12 on the hearing of the application of the sheriff "that the plaintiffs and the claimants appear and state the nature and particulars of their respective claims to the goods and chattels seized by the above-named sheriff under the writ of fieri facias issued in this action, and maintain or relinquish the same and abide by such order as may be made herein, and that in the meantime all further proceedings be stayed."

On June 12, at the hearing of the summons, the claim of Maple & Co., Limited, was admitted, and by consent it was ordered "that the said Sheriff of Sussex sell the goods seized by him under the writ of fieri facias issued herein and that no action be brought against the said sheriff for the seizure and sale of the said goods. And it is further ordered that out of the proceeds of the said sale the said sheriff do pay to Messrs. Maple & Co. their lien of seventy pounds (70*l.*) in the first instance. And it is further ordered that the costs of the said sheriff be paid out of the proceeds of the said sale with remedy over against the execution creditors."

On June 13 the sheriff sold the goods by public auction, and after paying his costs and the lien of Maple & Co., Limited, paid over on July 5 the sum of 109*l.* 16*s.* 10*d.*, being the balance of the proceeds of sale, to the defendants, the judgment creditors.

In the meantime, on June 29, a bankruptcy petition was

(1) [1912] 2 K. B. 520.

presented against Florence Chetwynd, the act of bankruptcy alleged being the aforesaid seizure and sale of her goods, and the same day notice of the petition was given to the defendants and to the sheriff. On October 23 a receiving order was made against Florence Chetwynd upon the petition, and on December 5 she was adjudicated a bankrupt and Mr. Mason was appointed the trustee in bankruptcy.

In January, 1912, the trustee commenced this action against the defendants, claiming payment of the 109*l.* 16*s.* 10*d.* received by them from the sheriff on the ground that the same formed part of the bankrupt's estate by reason of the sheriff having remained in possession of the said goods for a period of twenty-one days under the writ of fi. fa., which was an act of bankruptcy of which the defendants had notice. The defendants by their defence pleaded that the interpleader issue was finally disposed of on June 12, and that the sale was completed on June 13, and they denied that the sheriff was in possession for twenty-one days or that the debtor committed the act of bankruptcy alleged.

Phillimore J. held that the words "any interpleader issue ordered thereon is finally disposed of" in the proviso to s. 1 of the Bankruptcy Act, 1890, applied not only to cases where an issue was stated and was separately decided, but also to cases where on the hearing of the summons a decision was made which finally determined the matter in dispute; and that the words "time elapsing between" meant the time elapsing between the date of the summons and the date of such decision. He also held that in calculating the twenty-one days the whole of the period occupied by the interpleader proceedings, i.e., the four days from June 9 to June 12, both inclusive, and not merely the two days between those dates, ought to be reckoned, and that therefore the act of bankruptcy was not committed. He accordingly held that the claim of the trustee in bankruptcy failed.

The trustee in bankruptcy appealed.

Clayton, K.C., and *R. J. Willis*, for the appellant. Sect. 1 of the Bankruptcy Act, 1890 (1), makes the seizure and holding by

(1) The Bankruptcy Act, 1890, s. 1, enacts: "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of

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the sheriff of the debtor's goods for twenty-one days an act of bankruptcy. The act of bankruptcy takes place at the last moment of the twenty-first day after the seizure. In the present case the act of bankruptcy was complete at midnight of June 10. The proviso to the section does not apply. No order was made directing the sheriff to withdraw, nor was any interpleader issue ordered on the summons, and consequently no issue thereon was finally disposed of. There was therefore a terminus a quo but no terminus ad quem. The enacting part of the section therefore remains unimpaired. But even assuming that the proviso to the section did apply, "the time elapsing between" June 9, when the interpleader summons was taken out, and June 12, when the summons was "disposed of," was two days: *In re Railway Sleepers Supply Co.* (1) Deducting those two days the act of bankruptcy was complete on June 12, that is, on the day before the sheriff sold the goods. The appellant is therefore entitled to the proceeds of the sale.

[They were stopped.]

E. W. Hansell and *D. Hogg*, for the respondents. Sect. 1 of the Act of 1890 creates a new act of bankruptcy and ought to be strictly construed. The proviso to the section was intended to be for the benefit and protection of the execution creditor and ought to receive a liberal construction: *In re North.* (2) From the time the sheriff takes out an interpleader summons until the time it is disposed of the execution creditor is prevented from proceeding with his execution. He is equally powerless on the day the summons is taken out and on the day on which an order is made on it. To remedy this hardship the proviso to the section was enacted which provides that the time which elapses between the date at which the summons is taken out and the date

his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

"Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days."

(1) (1885) 29 Ch. D. 204.

(2) [1895] 2 Q. B. 264, 270.

at which the sheriff is ordered to withdraw or any interpleader issue ordered thereon is finally disposed of is not to be taken into account in calculating the period of twenty-one days. The terminus a quo is the date at which the summons is taken out, and the execution creditor is entitled to have the day on which the summons is taken out excluded from the computation of the twenty-one days. The time having commenced to run on June 9 continued to run until the interpleader proceedings were disposed of. Order LVII., which is the interpleader code, provides various means by which an interpleader summons may be disposed of.

[FARWELL LJ. referred to r. 7.]

That rule refers to the usual case where an interpleader issue is drawn up; but it is not necessary in all interpleader proceedings that an interpleader issue should be ordered. That is shewn by rr. 8 and 9. On the true construction of the proviso, it is submitted that the words "any interpleader issue ordered thereon is finally disposed of" applies not only to cases where an issue is stated and is separately decided, but also to cases where on the hearing of the summons a decision is made which finally determines the matter in dispute, and further that the words "time elapsing between" mean the time elapsing between the date of the summons and the date of such decision. If the proviso is to be limited to the case where a formal interpleader issue has been set down and disposed of the execution creditor would never get the benefit of the time occupied by the Court in otherwise dealing with the interpleader proceedings. The order made by the Master on June 12 finally disposed of the issue between the parties: *Hockey* v. *Evans*. (1)

Clayton, K.C., was not called upon to reply.

COZENS-HARDY M.R. This appeal raises a very curious point upon the proviso to s. 1 of the Bankruptcy Act, 1890. The material facts can be very shortly stated. On May 20, 1911, the sheriff seized the goods of the judgment debtor under a judgment of May 10. On June 9 an interpleader summons was taken out by the sheriff, in consequence, apparently, of a claim by Maple & Co., Limited, that they were entitled to a

(1) (1887) 18 Q. B. D. 390.

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certain sum for warehouse charges, and in respect of which they had a lien on the goods. On June 12 a consent order was made, which I will read: "Upon hearing the solicitors for the plaintiffs, the defendant, the claimants and the Sheriff of Sussex and by consent It is ordered that the said Sheriff of Sussex sell the goods seized by him under the writ of fieri facias issued herein, and that no action be brought against the said sheriff for the seizure and sale of the said goods. And it is further ordered that out of the proceeds of the said sale the said sheriff do pay to Messrs. Maple & Co. their lien of seventy pounds (70*l.*) in the first instance. And it is further ordered that the costs of the said sheriff be paid out of the proceeds of the said sale with remedy over against the execution creditors." Under these circumstances it is said on the one hand that the act of bankruptcy has been completed because of the enacting part of s. 1: "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days." Such seizure was made on May 20, and as the sale did not take place until June 13, it is quite plain that, but for the proviso, the act of bankruptcy had become complete. Then it is said that the proviso applies: "Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days." Mr. Clayton says that the proviso is altogether inoperative, and that you must have not merely a terminus a quo but a terminus ad quem if you are to calculate the period elapsing between the two dates. He says that the sheriff has never been ordered to withdraw. That is quite true. Then, as to the second point, he says, "Has any interpleader issue been ordered thereon?" Now the words "interpleader issue ordered" are technical terms. They are, I should have thought, pre-eminently technical terms in interpleader proceedings. Order LVII., which is the interpleader code, by r. 7 provides: "If the claimants

appear in pursuance of the summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant." When you come to r. 8, there is a different procedure. That rule provides that "The Court or a judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just." In that case there is no order for an interpleader issue. Then when you come to r. 9, again, the Court may, without directing the trial of an issue, order certain proceedings to be taken by way of a special case. Rule 11 also seems to me very important: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding"—the very words used in the proviso to s. 1—then it provides for cases where there shall or shall not be an appeal. Then when you come to r. 13, that rule contains words which you find elsewhere—not interpleader order but interpleader proceedings. We are asked to say that it would be extremely reasonable if the time was not to count until the interpleader proceedings have been disposed of. But it is not for us to legislate; we have only to construe the section. I think we should be going altogether outside our duty if we hesitated to say that the words "any interpleader issue ordered thereon" did not mean what those words plainly do mean and are intended to mean, namely, an order for the trial of an interpleader issue under the well-known common form of order in interpleader proceedings. Mr. Hansell and Mr. Hogg, both of whom have argued this case with great ability, inevitably slipped from the words of this proviso, and said it meant until the issue raised between the parties is finally disposed of. That is not the proviso. The proviso distinctly does not say that. It says either the sheriff has been ordered to withdraw or there has been an

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interpleader issue ordered. Neither of these events has happened, and in my opinion the proviso has no operation on the facts of the present case, and the enacting part of the section remains unimpaired.

Then Mr. Hogg has argued with great courage that, although there is a terminus a quo and no terminus ad quem, it really does not matter, because when once the time is started it goes on, and although you are told that you may refrain from taking count of something which elapses between the two periods, you are to work that out, I suppose, until the world comes to an end, because that is what it must mean if it once begins and there is no end to it. I am entirely unable to follow that part of Mr. Hogg's ingenious argument. It seems to me quite plain that the proviso has no operation, except in the case where there is a terminus a quo and a terminus ad quem. In my opinion on this point, without going at all into the question of whether the mode of calculation of days adopted by the learned judge was right, assuming the proviso had been operative, the proviso was not operative at all, and therefore it is not necessary to consider the point. The appeal must be allowed.

FARWELL L.J. I am of the same opinion. The Act of 1890, s. 1, creates a new act of bankruptcy, but the Legislature has thought fit to qualify that act by the proviso added thereto. The proviso is expressed in terms of art; technical phrases are used. It is a stringent rule of construction that in construing an Act of Parliament or a deed containing technical words those words must be given their technical meaning. It is idle to speculate what the Legislature might have done if its attention had been called to the fact that there are other modes of disposing of an interpleader summons than by ordering an interpleader issue. Surely it is conceivable that the Legislature may have been fully aware of the various modes of disposing of an interpleader summons and may have intentionally chosen one only by reason of the delay that would arise if others were chosen. In the Annual Practice Notes to Order LVII., r. 7, these various modes of procedure are set out. The Master or judge may decide the matter summarily under r. 8; he may transfer the proceedings to

the county court; he may substitute, or add, claimant as defendant; he may refer the whole matter to the judge under Order LIV., r. 20; he may decide a question of law (where the facts are undisputed) or order a special case under r. 9; he may order an issue to be tried; he may order a sale of the subject-matter under r. 12; or he may refuse the application. But however this may be, I can only take the words as I find them.

The last contention of Mr. Hogg involves the same thing, because I do not think he liked to adopt the millennium as the terminus ad quem. What he really meant was "until the interpleader summons was disposed of," but that still requires us to alter the words of the proviso. If he means eternity, I can only say I do not agree with him, because the twenty-one days are to be added to a fixed period beginning with one date and ending with another; a period beginning at one date and indeterminate at the other end is not a fixed period. I agree this appeal must be allowed.

HAMILTON L.J. I am of the same opinion. I am unable to read the precise words of this section as though the time elapsing between one date and another means, in the circumstances of this case, the time elapsing after the date of one event where the other event never happens at all. I am also unable to read the words "any interpleader issue ordered thereon" as applicable to an event with regard to which the one thing which is quite clear is that no interpleader issue was ordered thereon at all. The learned judge in the Court below suggests two ways of looking at the matter on p. 526 of the report in the *Law Reports:* it may be looked at as if notionally the Master ordered an interpleader issue to be tried before himself and then made the order which is here made; the other that it means that the matter at issue in the interpleader is finally disposed of. I do not think that the first suggestion is tenable, because there is an express and important difference between the Master doing that which he did, disposing of the issue raised in the summons,—disposing of the summons summarily—and the Master ordering an issue to be tried thereon, and tried before himself. The appeal is different in

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the two cases, as will be seen on reference to *Cox* v. *Bowen* (1) and *Blair* v. *Clark*. (2) I cannot therefore transpose the one proceeding for the other, where the practice applicable to them separately is different. On the other hand, to say that it means a "matter at issue in interpleader is finally disposed of" is to alter —possibly for the better, I know not, but to alter—the words of the section. The language of Order LVII. contemplates and says in express terms that there shall be interpleader proceedings, one part, and not a necessary part, of which shall be an interpleader issue, and provides the machinery for ordering an interpleader issue thereon. No reason can be shewn why, as a matter of construction, we should hold ourselves at liberty to read the words of the proviso as being anything except that which is provided for by the rules of the Order, namely, the case of an interpleader issue being ordered thereon. The term "interpleader issue" has been so long in use, since the statute 1 & 2 Will. 4, c. 58, created a mode of trying such questions by a feigned issue, and then the statute of 8 & 9 Vict. c. 109 altered the form from a feigned issue to an issue framed in the manner prescribed by that statute, that an interpleader issue and an order for an interpleader issue on an interpleader summons have not only had in the technical but in the general language of the law a perfectly precise meaning. I do not think we are at liberty to amend this proviso by giving it another meaning. I am fully sensible of the inconveniences and anomalies that have been pointed out, but I am not disposed to think that the Legislature may not have carefully considered all those matters and deliberately resolved that, in spite of those considerations, the proviso should be limited as it is. At any rate, the words of the statute are clear, and I do not think, in a section which is framed in technical language and as to which there can be no ambiguity, we are at liberty upon the principles of construction mentioned in *In re North* (3) to give the proviso a benevolent construction in favour of an execution creditor merely upon the ground that a new act of bankruptcy has been created and a new interference with the execution creditor's right of execution has been prescribed.

(1) [1911] 2 K. B. 611. (2) [1908] 2 K. B. 548.
(3) [1895] 2 Q. B. 264.

The limitation upon that interference is prescribed also, and there is no power in any Court of interpretation to go beyond the words of the proviso. The proper form of order will be to discharge the order below and give judgment for the plaintiff for the sum claimed, 109*l.* 16*s.* 10*d.*

Appeal allowed.

Solicitors: *G. Castle; Tackley & Fall.*

W. I. C.

NORTH RIDING OF YORKSHIRE COUNTY COUNCIL *v.* MIDDLESBROUGH COUNTY BOROUGH COUNCIL.

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Local Government—Creation of County Borough—Adjustment of Financial Relations between County and County Borough—Grant of Court of Quarter Sessions to Borough—Redemption of Liability to contribute Share of Costs of Quarter and Petty Sessions and Coroners—Terms on which Redemption of Liability to take place—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), *s.* 32, *sub-s.* 3 (*b*).

By s. 31 of the Local Government Act, 1888, certain large boroughs named in the Third Schedule to the Act (of which Middlesbrough was one) were to be county boroughs.

By s. 32, sub-s. 3 (*b*), "If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county or any franchise therein, and if a grant of a Court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act."

Middlesbrough was not at the passing of the Act a quarter sessions borough, and under an order of commissioners appointed under the Act the borough paid to the county of the North Riding of Yorkshire the annual sum of 337*l.* 6*s.* 11*d.* in respect of the borough's share of the costs incurred by the county of and incidental to quarter sessions, petty sessions, and coroners. The share of the costs of quarter sessions, petty sessions, and coroners of the county attributable to or incurred in respect of the borough in fact exceeded in each year the sum of 337*l.* 6*s.* 11*d.*

In 1910 a grant of a Court of quarter sessions was made to the borough. The borough and county councils, having failed to agree upon the terms on which the liability of the borough to make the contribution of the annual sum of 337*l.* 6*s.* 11*d.* should be redeemed,

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appointed an arbitrator in accordance with s. 32, sub-s. 3 (*b*), of the Act:—

Held, first, that the words "the borough shall redeem the liability to such contribution" in s. 32, sub-s. 3 (*b*), did not entitle the county council to receive from the borough such a capital sum as would produce a perpetual annuity of 337*l.* 6*s.* 11*d.* Secondly, that it did not result from the terms of the section that the borough council were entitled to redeem the annual payment of 337*l.* 6*s.* 11*d.* for a nominal sum, but in ascertaining the amount to be paid by them for redemption the arbitrator must take into consideration all the circumstances of the particular case, and that he ought to take into consideration on the one hand the fact that the services which were rendered by the county council were rendered at a loss, and on the other hand the fact that although these services ceased to be rendered to the borough council it by no means followed that the county council would profit to the full extent to which it had lost by rendering the services.

AWARD stated by an arbitrator in the form of a special case.

The borough of Middlesbrough is specified in the Third Schedule to the Local Government Act, 1888 (1), as being a county

(1) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 31: "Each of the boroughs named in the Third Schedule to this Act being a borough which on the first day of June one thousand eight hundred and eighty-eight, either had a population of not less than fifty thousand, or was a county of itself, shall, from and after the appointed day, be for the purposes of this Act an administrative county of itself, and is in this Act referred to as a county borough. . . . ."

Sect. 32, sub-s. 1: "An equitable adjustment respecting the distribution of the proceeds of the local taxation licences, and probate duty grant, and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by the commissioners appointed under this Act; and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment."

Sub-s. 3 (*b*): "If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county or any franchise therein, and if a grant of a Court of quarter

borough deemed for the purposes of that Act to be situate in the North Riding of Yorkshire. The borough of Middlesbrough was not at the passing of the Act a quarter sessions borough within the meaning of the Act.

By art. 2 of an order made by a commissioner appointed under the Act and bearing date April 27, 1892, it was, in pursuance of ss. 32 and 61 of the Act, and of the Expiring Laws Continuance Act, 1891 (54 & 55 Vict. c. 60), ordered as follows:

"(1.) The Council of the County Borough of Middlesbrough shall pay to the County Council of the North Riding of Yorkshire a contribution at the rate of 381*l.* annually towards the costs incurred by the county council of and incidental to the assizes and quarter and petty sessions and of and incidental to the coroners of the county and towards the costs of registration of the county parliamentary voters.

"(2.) The first contribution payable under this article shall be in respect of the six months ending the thirty-first day of March one thousand eight hundred and ninety-two."

The annual contribution had been duly paid by the borough of Middlesbrough (hereinafter called "the borough council") to the County Council of the North Riding of Yorkshire (hereinafter called "the county council") in pursuance of the order up to August 2, 1910, on which day a grant of a Court of quarter sessions was made to the borough.

By a claim dated December 1, 1910, the county council claimed that so much of the annual contribution of 381*l.* mentioned above as represented the borough's share of and incidental to the costs of quarter sessions, petty sessions, and coroners, namely, the sum of 337*l.* 6*s.* 11*d.* (hereinafter called "the said annual sum"), should be redeemed by payment by the borough council to the county council of a capital sum which being invested at the rate of 3*l.* 5*s.* per centum would produce an income equivalent to the borough's share of the costs, that is to say, the capital sum of 10,379*l.* 17*s.* 5*d.* The borough council refused to redeem the liability to the portion

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sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act:"

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of the annual contribution on the terms so claimed. The councils failed to agree upon the terms on which the liability should be redeemed and differed as to the appointment of an arbitrator to whom the settlement of the terms should be referred.

In pursuance of an application made by the county council to the Local Government Board under s. 62, sub-s. 2, of the Local Government Act, 1888, the Board appointed Mr. Alexander Glen, K.C., to act as arbitrator in the matter.

It was contended before the arbitrator on behalf of the county council (for whom no witnesses were called) that the terms on which the annual sum of 337*l.* 6*s.* 11*d.* was to be redeemed ought to consist of the payment of a capital sum which being invested at such a rate of interest as the arbitrator might determine would produce an income equivalent to that annual sum, and that in settling the terms he ought not to take into consideration the share of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county which was attributable to or incurred in respect of the borough before August 2, 1910, or which would have continued to be so attributable or incurred after that date if no grant of a Court of quarter sessions had been made to the borough.

On behalf of the borough council it was alleged that the share of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county which was attributable to or incurred in respect of the borough before August 2, 1910, exceeded, and that the share which would have continued to be so attributable or incurred after that date if no grant of a Court of quarter sessions had been made to the borough would have continued to exceed, in each year the said annual sum. And it was contended (*a*) that the said annual sum which was required by the Act of 1888 to be redeemed on terms to be agreed upon or determined by arbitration was payable by the borough council to the county council in respect of and in consideration of the incurring by the county council of so much of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county as was attributable to or incurred in respect of the borough; (*b*) that the grant of a Court of quarter sessions in consequence whereof the said annual sum was required to be

redeemed relieved the county council from incurring costs of and incidental to Courts of quarter and petty sessions and coroners as far as such Courts and coroners would otherwise have continued to be required for the purposes of or such costs would otherwise have been attributable to or incurred in respect of the borough, that is to say, from incurring costs to an amount exceeding in each year the said annual sum; and (*c*) that no terms of redemption of such annual sum would be fair or equitable which required the borough council to pay any substantial sum for such redemption. And it was further and in the alternative contended (*d*) that even if none of the foregoing contentions (*a*), (*b*), and (*c*) were well founded the claim for payment of the capital sum of 10,379*l.* 17*s.* 5*d.* was excessive.

Evidence was tendered for the borough council in support of the allegations made on their behalf, and objection to the reception of such evidence was made on behalf of the county council on the ground that the allegations and evidence were irrelevant or immaterial to the matter in dispute between the parties and that such evidence was not admissible or ought not to be received by the arbitrator. The arbitrator, being of opinion that the evidence was admissible, relevant, and material, received the same, but consented to state his award in the form of a special case for the opinion of the Court.

The arbitrator found: (1.) That the share of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county which was attributable to or incurred in respect of the borough before August 2, 1910, exceeded, and that the share which would have continued to be so attributable or incurred after that date if no grant of a Court of quarter sessions had been made to the borough in all reasonable probability would have continued to exceed, in each year the annual sum of 337*l.* 6*s.* 11*d.* (2.) That if the foregoing finding was irrelevant or immaterial or ought not to be taken into consideration the present value of the annual sum treated as a perpetual annuity was the aforesaid sum of 10,379*l.* 17*s.* 5*d.*

The questions for the opinion of the Court were:—

1. Whether the evidence to which objection was taken on behalf

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of the county council ought to have been received and considered by the arbitrator.

2. If not, whether the annual sum ought to be redeemed at its present value as a perpetual annuity, or on what other basis or principle the terms of redemption ought to be settled.

If the Court should be of opinion that the evidence ought to have been received and considered by the arbitrator, he awarded that the annual sum of 337*l.* 6*s.* 11*d.* should be redeemed on payment by the borough council to the county council of 20*s.* But if the Court should be of opinion that the evidence ought not to have been received or considered by the arbitrator, but that the annual sum ought to be redeemed at its present value as a perpetual annuity, he awarded that the annual sum should be redeemed on payment by the borough council to the county council of 10,379*l.* 17*s.* 5*d.*

If the Court should be of opinion that the evidence ought not to have been received or ought not to have been considered by the arbitrator, and also that the terms on which the annual sum should be redeemed ought to be settled on some other basis or principle than the basis of the present value of the annual sum treated as a perpetual annuity, the Court was requested to remit the matter to the arbitrator for his reconsideration subject to the opinion of the Court.

Sankey, K.C., and *G. F. Mortimer*, for the county council. Sect. 32 of the Local Government Act, 1888, provides for adjustment of the financial relations between county and borough. There is a special sub-section (sub-s. 3 (*b*)) which deals with what is to be done in case of a borough obtaining a grant of quarter sessions after the passing of the Act.

It is said on the other side that s. 32 is a code of which the keynote is equitable adjustment.

Sub-s. 3 (*b*) is an independent provision. That is the sole case in the Act in which a borough may have to pay for services after they have ceased to be rendered: see per Lord Atkinson in *West Hartlepool Corporation* v. *Durham County Council* (1): "The only express provision I can find in the Act

(1) [1907] A. C. 246, at p. 253.

for the payment by an urban area of any sum in respect of services which have ceased to be performed for its benefit is that contained in sub-s. 3 (*b*) of s. 32. According to this provision a county borough, which was not a quarter sessions borough at the passing of the Act, might, on becoming a quarter sessions borough, redeem the contribution it was obliged to make before the change . . . ."

The words "on such terms" in s. 32, sub-s. 3 (*b*), cannot alter the fundamental part of the sub-section which imposes on the borough the liability to redeem. The borough has to redeem an existing liability, namely, the liability to pay an annual sum of 337*l.* 6*s.* 11*d.* Therefore the arbitrator is not at liberty to take into consideration the fact that the county council may derive a benefit by the grant of the Court of quarter sessions to the borough.

Lankester, *K.C.*, and *Jeeves*, for the borough council. If the argument on behalf of the county council is sound, the arbitrator has no power to consider what is equitable between the parties. Sect. 32, sub-s. 1, of the Local Government Act, 1888, shews that the scheme is that when a county borough is carved out of a county each should be a separate entity and that an equitable adjustment of the financial arrangements between them should take place. It would be inequitable that when the services cease they should be paid for by the borough as if they were still being rendered. The borough now pays for its quarter sessions, petty sessions, and coroners, and in addition to that it will, if the argument for the county council is upheld, have to provide the annual sum of 337*l.* 6*s.* 11*d.* for services not rendered. The Court will not place that construction upon the language of the Act of 1888 unless the words used are so clear and stringent that no other construction is possible. The words "shall redeem" in s. 32, sub-s. 3 (*b*), mean that some fair sum must be paid by the borough which in all the circumstances is equitable. The borough has to redeem the "liability," not the "contribution." The arbitrator would have nothing to decide if the borough is liable to provide the 337*l.* 6*s.* 11*d.* annually. The dictum of Lord Atkinson in *West Hartlepool Corporation* v. *Durham County Council* (1) is obiter and misconceived.

(1) [1907] A. C. 246, at p. 253.

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[Sub-s. 6 of s. 32 of the Local Government Act, 1888, was also referred to.]

Sankey, K.C., in reply. It is true that the dictum of Lord Atkinson in *West Hartlepool Corporation* v. *Durham County Council* (1) is obiter, but it is directly in point and governs the present case. The contention on behalf of the borough council is in effect that the liability to contribute is to cease. That is not the language of s. 32, sub-s. 3 (*b*), which says that "the borough shall redeem the liability."

BAILHACHE J. The borough of Middlesbrough some years ago became a separate county borough, and in 1892, under ss. 32 and 61 of the Local Government Act, 1888, and the Expiring Laws Continuance Act, 1891, the necessary adjustment of burdens between the borough of Middlesbrough and the county of the North Riding of Yorkshire was made, but although Middlesbrough became a separate county borough, it had not its own quarter sessions, petty sessions, coroner, and assizes, nor did it conduct the registration of the county parliamentary voters. The services included under those heads continued to be performed by the county council of the North Riding of Yorkshire, and in the scheme of adjustment under s. 32 of the Act of 1888 the expense of them fell within the provision contained in sub-s. 1 of that section, "and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute"; and by the scheme of adjustment the borough continued to contribute, in respect of those services, the sum of 381*l.* per annum. In 1910 the borough obtained its own quarter sessions, and the proportion of the 381*l.* which related to quarter sessions, petty sessions, and coroners was 337*l.* 6*s.* 11*d.* The question which I have to decide is—the county having ceased to render those services—what, if anything, is the borough to pay the county in respect of its liability to contribute to the county the yearly sum of 337*l.* 6*s.* 11*d.*? That question turns upon the true construction of the following provision contained in s. 32, sub-s. 3 (*b*), of the Act of 1888: "if a

(1) [1907] A. C. 246, at p. 253.

grant of a Court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act." It appears that, although the county was receiving from the borough 337*l.* 6*s.* 11*d.* annually in respect of the services which it continued to render to the borough, the county was losing by the transaction.

On behalf of the borough council it is contended that, in redeeming the liability to the contribution which it was liable to make, the fact that the county council was a loser by the services rendered and would therefore gain by ceasing to render those services ought to be taken into account, and that the result is that under the word "redeem" in s. 32, sub-s. 3 (*b*), of the Local Government Act, 1888 (a word which is perhaps a little difficult to apply), the county ought not to receive any payment in respect of the cessation of the contribution of 337*l.* 6*s.* 11*d.* upon the ground that the result of the transaction is that, although there is a cessation of that contribution, there is in fact no loss but a gain to the county.

On behalf of the county council it is contended, on the other hand, that I ought not to take those matters into consideration, but ought merely to consider the fact that the borough was contributing 337*l.* 6*s.* 11*d.* to the county in respect of certain services, that the borough will cease henceforward to contribute that or any other sum in respect of those services, and that therefore the county ought to receive such a capital sum as will produce a perpetual annuity of 337*l.* 6*s.* 11*d.*

In my judgment neither of those views is right. In my opinion the true view is that when the liability to contribute is determined the liability is to be redeemed on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration, and I cannot assent to the contention which has in substance been put forward on behalf of the borough council that "redemption" is equivalent to "cessation"; but although I do not think it is, I can well understand that in considering upon what terms redemption is to be made it is right and proper for the arbitrator to take into consideration all the facts of the

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Bailhache J.

case. He ought to take into consideration on the one hand the fact that the services which were rendered by the county were rendered at a loss, and on the other hand the fact that although those services will cease to be rendered to the borough it by no means follows that the county will gain to the full extent to which it lost by rendering those services. There are probably certain standing charges—salaries and expenses of that kind—which it still has to pay. It may be that it has incurred the expense in years gone by of building larger courts and perhaps larger prisons than it would otherwise have built. Those are matters which it seems to me right and proper for the arbitrator to take into consideration. I think he should take all these matters into consideration, and, having done so, should then consider what is a fair and reasonable sum in this case for the borough council to pay the county council.

In my judgment the word "redemption" excludes the payment of a merely nominal sum such as 20*s*. On the other hand I think that the case for the county council is put too high when it is contended that it is entitled to a sum which will bring it in the clear yearly sum which it in fact ceases to receive. The case ought therefore to go back to the arbitrator. I do not think he has quite considered the matter from that point of view. He seems to me to have considered it from both extremes, but hardly from this intermediate point of view. It is very difficult to give the arbitrator guidance further than this: that I think he ought to give weight to the word "redemption," and that that word means something more than a merely nominal sum. The redemption cannot be effected by a mere payment of 20*s*. together with cessation of liability to render certain services; but in my judgment redemption ought to take place on payment of a substantial sum—nothing like such a sum as will bring in a permanent annuity—and in arriving at that sum the arbitrator ought to take into consideration all the facts, giving less, of course, in a case where the county gains by ceasing to render the services, but at the same time not on that account reducing the payment to a purely nominal sum.

I therefore remit the award to the arbitrator in order that in

view of what I have indicated in my judgment he may reconsider the matter.

The evidence mentioned in question 1 was admissible and was quite rightly accepted.

Award remitted.

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Solicitors for county council: *Lowe & Co., for W. C. Trevor, Guisborough.*

Solicitors for borough council: *Soutter & Fox, for Town Clerk, Middlesbrough.*

J. E. A.

SIMS & CO. *v.* MIDLAND RAILWAY COMPANY.

1912
Nov. 19, 20.

Railway—Carriage of Goods—Reasonable Time for Delivery—Strike of Railway Company's Servants—Perishable Goods—Sale by Agent of Necessity.

Perishable goods were consigned by the defendants' railway for delivery to the plaintiffs, no time being specified within which the goods were to be delivered. During the transit a general strike of railway servants, including the defendants' servants, broke out, and the defendants were unable to forward the goods to their destination. There was no evidence that the strike was caused or contributed to by the defendants. The goods becoming deteriorated the defendants sold them. In an action to recover damages for breach of contract to deliver the goods:—

Held, that in calculating what was a reasonable time for delivery in accordance with the principle laid down in *Hick* v. *Raymond & Reid* [1893] A. C. 22, the strike of the defendants' servants must be taken into consideration as one of the circumstances existing at the time of the carriage, and that therefore the defendants were not liable for the delay.

Semble, per Scrutton J.: The doctrine as to sale by an agent of necessity applies to a carrier by land as well as by sea provided that the necessary conditions exist, namely, that there is a real necessity for the sale, and that it is practically impossible to get the owner's instructions in time as to what shall be done.

APPEAL from the Bristol County Court.

The action was brought to recover 8*l.* 2*s.* as damages for breach of the defendants' contract to deliver three boxes of butter to the plaintiffs at Whitecroft, in Gloucestershire. The butter was delivered to the defendants at Bristol soon after 5 P.M. on Thursday, August 17, 1911, for conveyance to Whitecroft.

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No time was specified in the consignment note within which the butter was to be delivered. The butter arrived at Sharpness early on the morning of August 18, when in consequence of a strike of the defendants' servants, which was part of a general railway strike which had then broken out, the defendants were unable to send the butter on to its destination. On Saturday, August 19, the butter, owing to the great heat of the weather, began to ooze through the joints of the boxes, and the station-master at Sharpness, acting on the instructions of the defendants, sold the butter, and it realized 4*l.* 4*s.* The defendants paid this sum into Court.

The county court judge was of opinion that, as the defendants had failed to deliver the butter at all, the burden lay upon them, as common carriers, to shew that the loss was caused by the act of God, the King's enemies, or the inherent nature of the butter; that the delivery was not prevented by either of the first two causes, nor was it prevented by the inherent nature of the butter, but by the default of the defendants' own servants; that if the delay had been caused by a strike of a third person's servants, as in the case of *Hick* v. *Raymond & Reid* (1), the delay would have been caused by a circumstance beyond the defendants' control, and that circumstance would have to be taken into account in calculating what was a reasonable time within which to deliver the butter, whereas in the present case the delay was caused by a strike of the defendants' own servants; and that the case of *Hick* v. *Raymond & Reid* (1) did not apply to a delay caused by the default of the carrier's own servants, and therefore the strike was not a circumstance to be taken into account in calculating what was a reasonable time. He accordingly gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Sir Alfred Cripps, K.C., and *J. D. Crawford*, for the defendants. No time having been specified in the consignment note for delivery of the butter, the defendants' obligation was to deliver it within a reasonable time. What is a reasonable time

(1) [1893] A. C. 22.

depends upon the existing circumstances: *Hick* v. *Raymond & Reid* (1), where it was held, affirming the judgment of the Court of Appeal (2), that in calculating what was a reasonable time for discharging a ship's cargo one of the existing circumstances to be taken into account was a strike of the men employed by the consignees' agents or sub-contractors to unload the cargo, the strike not having been caused or contributed to by the consignees. No distinction can be drawn between a strike of the carrier's own servants and a strike of the servants of the carrier's agents. The reasonableness of the time must depend upon the actual conditions existing at the time of the carriage. As was laid down in *Taylor* v. *Great Northern Ry. Co.* (3), in the absence of express contract as to the time of delivery there is an implied contract in the case of a common carrier to deliver within a reasonable time looking at all the circumstances. It is not suggested here that the strike of the defendants' servants was caused or contributed to by any act or default of the defendants or was in any way within their control. The strike was a general strike of railway servants all over the country. The delay or non-delivery was, in the language of Lord Watson (4), attributable to causes—namely, the strike—beyond the defendants' control, and they had not acted negligently or unreasonably. The defendants were therefore not liable for the delay caused by the strike, and the county court judge was wrong upon this point.

[SCRUTTON J. referred to *Hulthen* v. *Stewart & Co.* (5)]

There remains the question whether, if the defendants are right on their first point, they were entitled to sell the butter. The butter was oozing away owing to the heat of the weather, and there was no prospect of being able to forward it in good condition, and they sold the butter on Saturday, August 19. The defendants were bound to do their best to minimize the loss. The county court judge did not fully consider or decide this point as he was in favour of the plaintiffs upon the first point.

Holman Gregory, K.C., and *Inskip*, for the plaintiffs. The judgment of the county court judge was right. In ascertaining

(1) [1893] A. C. 22.
(2) Reported sub nom. *Hick* v. *Rodocanachi* [1891] 2 Q. B. 626.
(3) (1866) L. R. 1 C. P. 385.
(4) [1893] A. C. at p. 33.
(5) [1903] A. C. 389.

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what is a reasonable time for delivery all the existing circumstances must be taken into consideration in so far as those circumstances have not been brought about by any act or default of the carrier. If the act or default causing the delay is that of the carrier's own servants, the carrier is not excused. It is in such a case his own act or default which causes the delay. A railway company can only act by its servants, and the act or default of its servants is the railway company's own act or default. In *Hick* v. *Raymond & Reid* (1) it is stated that the dock company were the consignees' agents to unload the cargo. But the word "agent" there means contractor employed by the consignees to unload, and not agent in the strict sense of the term, and therefore the strike of the contractor's servants causing the delay was in reality the strike of a third person's servants. That is made clear by the observation of Lindley L.J. when the case was in the Court of Appeal (2): "We have to deal with implied obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control. Where no time for unloading is fixed by contract the merchant's obligation is, in my opinion, to use all reasonable diligence under the circumstances which exist at the time of unloading, unless . . . . those circumstances are attributable to his own conduct. Unless he has caused the delay, or unless it has been caused by his agents or servants, he is in no default." The word "agent" in that passage clearly means the alter ego of the consignee, and not a contractor employed by the consignee to unload. In the latter case the default of the contractor is the default of a third person and is not attributable to the consignee. The language of the Law Lords in the House of Lords must be read in that light. That being so, the defendants are liable for the non-delivery of the butter.

Even if the strike was a circumstance to be taken into account in calculating what was a reasonable time for delivery, the defendants had no right to sell the butter. The plaintiffs are suing for damages for non-delivery of the butter, and the defendants put it out of their power to deliver it by wrongfully selling it.

(1) [1893] A. C. 22. (2) [1891] 2 Q. B. at p. 638.

The duty of a common carrier is to deliver the goods entrusted to him for carriage unless he is prevented from so doing by the act of God, the King's enemies, or the inherent nature of the goods. In *Taylor* v. *Great Northern Ry. Co.* (1) the duty of a common carrier to deliver is clearly stated. See also *Forward* v. *Pittard.* (2) It may be that a case might arise in which a common carrier by land would become an agent of necessity to sell the goods. There has been no case in which the doctrine as to the sale, in case of necessity, by the master of a ship has been applied to a carrier by land. It must be very rare to find the conditions existing which would be necessary to make such a sale valid. But even if the doctrine is applicable the conditions necessary to make such a sale valid were not proved in this case. Those conditions, as stated in Carver on Carriage by Sea, s. 297, are (1.) that a real necessity must exist for the sale, and (2.) that it must be practically impossible to get the owner's instruction in time as to what shall be done. The defendants did not attempt to prove either of those conditions. They never attempted to communicate with the consignees before selling.

[SCRUTTON J. This question was not gone into before the county court judge, because he was in favour of the plaintiffs upon the first point, and if necessary there will have to be a new trial upon this point.]

J. D. Crawford in reply. In *Great Northern Ry. Co.* v. *Swaffield* (3) the Court considered that the doctrine as to the authority of the master of a ship in case of necessity applied to a carrier by land; and in Macnamara on Carriers by Land, 2nd ed., p. 189, that case is referred to as an authority for the proposition that a common carrier by land, upon an emergency or accident happening, becomes agent by necessity for the owner to take care of the goods, and to pledge his credit for that purpose. (4)

RIDLEY J. In my opinion this appeal must be allowed upon the first point, namely, that in calculating what is a reasonable

(1) L. R. 1 C. P. 385.
(2) (1785) 1 T. R. 27.
(3) (1874) L. R. 9 Ex. 132, at p. 138.
(4) In order to avoid a new trial in case the Court decided in favour of the defendants upon the first point, the parties came to an arrangement upon the second point.

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time for delivery the strike of the railway company's servants should be taken into consideration. It has become unnecessary to deal with the second point, namely, whether the railway company had any right to sell the butter, because the parties have come to an arrangement as to that point which only arises in the event of our judgment being in favour of the railway company on the first point.

The facts are shortly these. The defendants had accepted butter at Bristol for delivery to the plaintiffs at Whitecroft. A general railway strike, including a strike of the defendants' servants, broke out, and the defendants were unable to forward the butter beyond Sharpness. The butter began to deteriorate in consequence of the hot weather. The defendants, being unable to forward the butter, sold it, and the plaintiffs brought this action to recover damages for non-delivery. The argument urged on behalf of the plaintiffs in the county court, according to the judge's notes, was that the defendants' servants refused to carry and deliver; that the default was that of the defendants by their servants; and that it made no difference whether one servant refused to carry or all refused. The county court judge gave judgment for the plaintiffs, holding that the case of *Hick* v. *Raymond & Reid* (1) did not apply to a delay caused by the default of the carrier's own servants. That is to say, the county court judge held that a strike of the defendants' own servants could not be taken into consideration in calculating the reasonable time for delivery, though a strike of a third person's servants could be taken into consideration. I have come to the conclusion that the learned judge's decision was wrong. In my opinion the case of *Hick* v. *Raymond & Reid* (1) concludes the present one. In that case cargo was shipped under a bill of lading for delivery in London, and no time was specified within which the discharge was to be completed. It became therefore the duty of the consignees to discharge the cargo within a reasonable time. The consignees employed the dock company as their agents to discharge the cargo, and a strike occurred among the labourers employed by the dock company. Hence there arose delay in discharging the cargo. It was held that the consignees were not

(1) [1893] A. C. 22.

liable in damages to the shipowners for the delay; that the obligation of the consignees was to discharge the cargo within a time which was reasonable in the actual existing circumstances, one of those circumstances being the existence of the strike which was not caused by any act or default on the part of the consignees. As Lord Herschell said (1), "The only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist . . . . When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." Lord Watson (2) says that the condition of reasonable time has been held to mean "that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably." Lord Ashbourne (3) speaks of the happening of the strike being "entirely beyond and outside the control of either."

It is not right to say that, because a strike of the servants of the defendants, who are under a duty to deliver the goods, causes the delay, it follows that the cause of delay is one within the defendants' control, and that they are liable for it. I can imagine a case in which it might be said that the happening of the strike was within the control of the railway company; but there ought to be evidence of it. Apart from such evidence the mere fact that there was a strike among the railway company's servants causing the delay would not make the company liable; but the strike would be an existing circumstance in the ascertainment of a reasonable time. I do not say how the matter would have stood if there had been evidence that the strike was brought about by some unreasonable demand on the part of the railway company. There was no such evidence. The county court judge was wrong in holding that merely because the strike was that of the defendants' own servants the rule of law is different from that which would apply in the case of a strike of a third person's servants. The defendants are therefore entitled

(1) [1893] A. C. at p. 29. (2) Ibid. at pp. 32, 33.
(3) Ibid. at p. 33.

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to succeed upon the first point. It is unnecessary to consider the second point, as to which the parties have come to an arrangement. The judgment of the county court judge will be set aside.

SCRUTTON J. I am of the same opinion. The plaintiffs brought an action against the defendants for breach of contract in not delivering three boxes of butter of the value of 8*l.* 2*s.* They proved that the butter was handed to the defendants at Bristol late in the afternoon of August 17, 1911, for carriage to Whitecroft, in Gloucestershire, and that it was never delivered. The defendants' answer is that after they had received the butter a strike of their own servants took place, and they were unable to forward the butter beyond Sharpness; that they, as carriers, were bound to deliver within a reasonable time, and that in calculating what was a reasonable time they were entitled to take into account the strike of their own servants. They further said that owing to the hot weather the butter, being perishable, would not have arrived at its destination of any value to the consignees, and that they accordingly sold it.

There are obviously two stages in that defence. First, that in calculating what was a reasonable time for delivery they were entitled to take into account the strike of their own servants; and second, that if they were so entitled, they were justified in selling the butter instead of keeping it to be delivered when the strike was at an end. The county court judge took the view that the defendants failed in the first stage of their defence, because he held that in calculating what was a reasonable time they were not entitled to take into account the fact that their own servants refused to work; and with reference to the decision of the House of Lords in *Hick* v. *Raymond & Reid* (1), in which it was held that a strike of the servants of the agent employed by the consignees, that is to say, of the servants of a sub-contractor, could be taken into account in calculating what was a reasonable time for discharging, he held that that case did not apply to a delay caused by the default of the carrier's own servants. Taking that view he never arrived at the point at which it was necessary to consider, whether

(1) [1893] A. C. 22.

if the railway company were right upon the first point, they were entitled to sell the butter.

I am unable to agree with the view taken by the county court judge upon the first point. Before the decision in *Hick* v. *Raymond & Reid* (1) it was not clearly settled to what extent the refusal of persons employed to do the work of discharge could be taken into account in ascertaining what was a reasonable time for discharging, and that case decided that all the existing circumstances, including the fact that the servants of a sub-contractor whom the consignees had employed to do the work of discharge struck and refused to work, ought to be taken into account. That case was argued upon the assumption that it was not possible for the consignees to find any other person to provide the necessary labour or obtain it in any other way. In my opinion there is no difference in principle between a strike of the servants in the regular employment of the carrier and a strike of the servants of a sub-contractor employed by the carrier to perform his contract, and in calculating what is a reasonable time a strike of the servants regularly employed by the carrier must be taken into account, provided that, in the language of Lord Macnaghten in *Hulthen* v. *Stewart & Co.* (2), the circumstances in existence are not "circumstances brought about by the person whose duty it is to take delivery"—in the present case to make delivery—"or circumstances within his control." I desire to say nothing with regard to a lock-out, which may give rise to difficult questions as to which it would be necessary to know the circumstances which brought about the lock-out. But a strike in its nature is prima facie beyond the control and against the wish of the employer. If it could be proved that other men could be obtained to do the work, the decision in *Hick* v. *Raymond & Reid* (1) would not apply, because the assumption on which that case was argued would not then exist; nor would it apply if it were proved that the strike resulted from such unreasonable conduct on the part of the employer as to disentitle him to take it into account in calculating a reasonable time. It is sufficient to say that there is no trace of any such evidence in this case.

(1) [1893] A. C. 22. (2) [1903] A. C. 389, at p. 392.

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I am therefore of opinion that the county court judge was wrong upon this point. He should have decided it in favour of the defendants, and then proceeded to consider whether, taking into account the strike, necessity justified the sale. If the parties had not arrived at an agreement we should have had to send the case back to the county court judge for retrial upon this point. We have not the full facts before us which are necessary to enable us to express an opinion upon this part of the case, but, as the matter has been argued before us, I desire to say that in my opinion the law as to the power of sale and the duty to take care of the goods which is laid down in the case of a carrier by sea applies to a carrier by land where the necessary conditions giving rise to such a power and duty exist, and I am glad to find that Pollock B. in *Great Northern Ry. Co.* v. *Swaffield* (1) took the same view. As stated in Carver on Carriage by Sea, s. 297, in the case of a carrier by sea "the conditions necessary in order to make such a sale valid are—(1.) that a real necessity must exist for the sale, and (2.) that it must be practically impossible to get the owner's instruction in time as to what shall be done." Obviously it is not very often in the case of carriage by land that these two conditions do exist, and therefore the conditions may be of rare occurrence. If the case had to be retried it would be necessary to consider whether there was a real business necessity for the sale in view of the probable duration of the strike and the nature of the goods, and whether it was possible from a business point of view to communicate with the consignees and obtain their instructions before the sale. If the sale were found to be unjustifiable, the measure of damages would not be the 8*l.* 2*s.*, the value of the butter when delivered to the defendants for carriage, which was awarded as damages, but the value to the owner at the time when the butter ought to have arrived at the place of destination, and it might well be that the butter at the end of the transit would have arrived in such a condition that it would not be worth 8*l.*, or anything more than a very small sum. We are relieved, however, by the agreement between the parties from going into those questions, and I only express my opinion upon the point because it has been argued before us.

(1) L. R. 9 Ex. 132, at p. 138.

For these reasons I agree that the judgment of the county court judge must be set aside.

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Appeal allowed.

Solicitors for plaintiffs: *Ford & Ford, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

Solicitors for defendants: *Beale & Co.*

W. F. B.

NETTLEINGHAM & CO. *v.* POWELL & CO.

1912
Nov. 20.

Employer and Workman—Claim for Indemnity by Employer against Third Party—Workmen's Compensation Rules, 1907, *rr.* 19, 24—*Omission to serve Notice of Claim—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

Where a workman has recovered compensation under the Workmen's Compensation Act, 1906, from his employer in respect of an accident which was caused by the negligence of a third party, it is not a condition precedent to the employer's right to maintain an action for indemnity against the third party under s. 6 of that Act that he should have filed and served on the third party a formal notice of his claim under r. 24 of the Workmen's Compensation Rules, 1907.

TRIAL of action before Phillimore J. without a jury.

The plaintiffs were corn merchants and the defendants were the owners of the steamship *Norfolk Coast*. On February 18, 1911, the ship was alongside the plaintiffs' wharf at Gravesend discharging a cargo of oil cake in bags on to the wharf. In the course of discharging the bags were put into slings by, amongst others, one John Collyer, a workman in the plaintiffs' employment. The slings were raised from the hold of the ship to be transferred on to the wharf by means of the ship's winch, which was driven and controlled by one of the crew of the ship, a servant of the defendants. Whilst Collyer was engaged in the hold in so unloading he received injuries owing to the negligence of the defendants' winchman, and was thereby totally incapacitated for work. The plaintiffs by agreement with Collyer, who had been earning on an average 30*s.* per week, paid him as compensation under the

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Workmen's Compensation Act, 1906, a weekly sum of 15*s.*, and continued to pay him that sum for forty-one weeks. Then, thinking that his incapacity for work had ceased to be total, they reduced the weekly payment to 7*s.* 6*d.*, and paid him that sum for nine weeks. Collyer, who claimed that his incapacity was still total, commenced arbitration proceedings in the county court for the recovery of further compensation upon that basis. The plaintiffs had some months before the hearing of the arbitration informed the defendants by letter that they intended to claim indemnity under s. 6 of the Workmen's Compensation Act, 1906 (1), but they did not file or serve upon the defendants a formal notice of their claim under rr. 19 and 24 of the Workmen's Compensation Rules, 1907 (2), and the defendants did not appear in the arbitration. At the hearing the judge made an award that the plaintiffs should pay to Collyer a lump sum of 52*l.* 10*s.* for compensation and 22*l.* 10*s.* as his costs in the arbitration. The plaintiffs then brought this action against the defendants under s. 6 to recover 136*l.* 12*s.*, the amount of the expenses to which they had been put by reason of the defendants' negligence. The

(1) By the Workmen's Compensation Act, 1906, s. 6, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof . . . .

"(2.) If the workman has recovered compensation under this Act the person by whom the compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

(2) By r. 24 (1.) of the Workmen's Compensation Rules, 1907, "Where a respondent claims that if compensation is recovered against him he will be entitled under section 6 of the Act . . . . to indemnity against any person not a party to the arbitration he shall file and serve a notice of his claim in accordance with rule 19."

"(2.) If any person served with a notice under the last preceding paragraph (hereinafter called the third party) desires to dispute the applicant's claim in the arbitration as against the respondent . . . . he must appear before the judge on the day fixed for proceeding with the arbitration . . . . and in default of his so doing he shall be deemed to admit the validity of any award made against such respondent as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent, whether such award is made by consent or otherwise."

sum was made up as follows: 30*l.* 15*s.*, compensation for forty-one weeks at 15*s.* per week; 3*l.* 7*s.* 6*d.*, nine weeks' compensation at 7*s.* 6*d.* per week; 14*s.* 6*d.*, Collyer's fare to London for medical examination; 75*l.*, the amount of the award; 17*l.* 6*s.*, the plaintiffs' costs in the arbitration; and 9*l.* 9*s.* medical fees. The defendants set up by way of defence (inter alia) that the plaintiffs were not entitled to maintain the action as they had not served on the defendants a notice of claim in compliance with the Rules.

Hollis Walker, K.C., and *Harold Morris*, for the plaintiffs. The service by the employer of a notice of his claim to indemnity upon the third party is not a condition precedent to his bringing an action to recover that indemnity. Rule 24 means that if the employer wishes to bring in the wrong-doer as a third party to the arbitration between himself and the workman, with the object of binding him as to the amount of the award, he must follow the procedure there laid down. But if he prefers to dispense with the third party procedure altogether and to run the risk of the validity of the award being subsequently disputed he may do so. If the rule was meant to apply in all cases, the provision that the third party shall be bound by the finding of the county court judge as to amount would be inconsistent with s. 6, sub-s. 2, of the Act of 1906, which says that "all questions as to the . . . . amount of any such indemnity shall" in the absence of the consent of the parties "be settled by action." Moreover the rule, so far as it purported to limit the power of the judge on the trial of such action to determine the amount of the indemnity, where the action was brought in the High Court, as here, would clearly be ultra vires, for it is made under the powers contained in Sched. II., par. 12, under which "rules of court may be made for carrying into effect this Act so far as it affects the county court." There is no power to make rules to affect the High Court. [They referred to *Thompson* v. *North Eastern Marine Engineering Co.* (1) and *The Rigel.* (2)]

A. Neilson, for the defendants. Apart from the Act of 1906 the plaintiffs would have no right of action against the defendants.

(1) [1903] 1 K. B. 428. (2) [1912] P. 99.

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Their right is entirely the creature of statute, and in the exercise of it they must follow strictly the provisions of the statute. The words "shall be settled by action" in s. 6 mean by action in accordance with the rules under the Act. The plaintiffs were therefore bound before commencing their action to serve the notice of claim provided for by r. 24. Except on receipt of such a notice the defendants could not appear in the arbitration. They ought to have had an opportunity of intervening at an early stage, in which case they might have been able to reduce the costs and damages.

PHILLIMORE J. In this case a question is raised which has apparently not yet been the subject of decision under the Workmen's Compensation Act, 1906. Under s. 6 of that Act where a workman has in the course of his employment suffered personal injury from an accident resulting from the negligence of a stranger he has an alternative remedy; he may proceed against the stranger for damages or against his employer for compensation. But as he may not be desirous of raising the question of the negligence of the stranger and may prefer his safer and surer remedy under the compensation clauses of the Act against his employer, it was considered hard that the employer should not be able in his turn to recover from the wrong-doer the damages which but for the wrong-doing he would never have had to pay, and accordingly it was provided by sub-s. 2 that "If the workman has recovered compensation under this Act the person by whom the compensation was paid . . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act." In this case the defendants by their servant were guilty of an act of negligence which led to a serious personal injury to a workman in the employment of the plaintiffs. The plaintiffs paid a certain amount of compensation to the workman by agreement, and a certain further sum under a compensation award, and they now seek to recover from the defendants the amounts so paid by them, together with certain other expenses to which they have been put

by reason of the accident, by way of indemnity under s. 6. It is said that they are not entitled so to recover because they have not complied with r. 24. That rule says in sub-s. 1 that "Where a respondent claims that if compensation is recovered against him he will be entitled under section 6 of the Act . . . . to indemnity against any person not a party to the arbitration he shall file and serve a notice of his claim in accordance with rule 19," and then in sub-s. 2 goes on to provide that if the third party being so served with the notice makes default in appearing he shall be deemed to admit the validity of the award against the respondent in the arbitration as to any matter which the judge has jurisdiction to decide. I can see nothing in that rule which says that the respondent, if he wants to claim indemnity, is bound to adopt this third party procedure. It is no doubt desirable that he should do so, and, if he does not, his claim may be open to very close scrutiny; he will have to prove everything de novo in his action, and if the third party can shew that anything would have been saved by invoking him, the third party will be entitled to have that saving in reduction of the respondent's claim against him; but there is nothing in the rule which goes any further. Indeed it is clear that it is not in every case in which the employer makes a claim for indemnity under s. 6 that it is necessary to serve any notice under r. 24. For that rule only applies where there is a respondent, and there is no respondent if the parties agree to the amount of compensation and consequently dispense with any application to the county court judge. If the employer by agreement pays the workman half his weekly earnings during the period of his incapacity, say for six months, and then is minded to make the wrong-doer pay him for those six months' half wages, it is clear that r. 24 does not apply, and that the absence of a formal notice of claim is no bar to the employer's right of action under s. 6. In this particular case I can see no answer to the plaintiffs' claim for the first two items in their particulars, namely, the 15*s.* per week for forty-one weeks and the 7*s.* 6*d.* per week for nine weeks. The only way in which the defendants could meet that would be by the argument that a man does not "recover compensation" unless he recovers it by process before the county court, an

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argument which would drive every employer who was seeking indemnity against a third party to put his workman at arm's length and compel him to take proceedings against him in the county court, which would obviously be contrary to the policy and practice of the Act. Therefore it is to my mind clear that there is a class of cases in which an action may be brought under s. 6 without reference to r. 24 at all. Having got so far I have the less difficulty in saying that an employer, even when he is a respondent in the county court, may, if he chooses to take the risk of so doing, dispense with the third party procedure provided by r. 24, and, without serving any notice under that rule, sue in the High Court for an indemnity subject to the obligation of having to satisfy the Court that the amount claimed was properly paid by him.

[The learned judge then proceeded to examine the evidence and found that the compensation paid by the plaintiffs was paid under a legal liability, that the award of the county court judge was valid, and that the expenses of the litigation in the county court were properly incurred; and he accordingly gave judgment for the plaintiffs for the full amount claimed.]

Judgment for plaintiffs.

Solicitors for plaintiffs: *W. Hurd & Son.*
Solicitors for defendants: *Holman, Birdwood & Co.*

J. F. C.

CALDWELL *v.* BETHELL.

1912
Nov. 25.

Licensing Act—Sale of Intoxicating Liquor otherwise than by Standard Measure —Sale by Servant of Licensed Person—Liability of Servant to Penalty—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 69, *sub-s.* 2.

By s. 69, sub-s. 2, of the Licensing (Consolidation) Act, 1910, "If any person sells" otherwise than by standard measure any intoxicating liquor not in cask or bottle and in a quantity not less than half a pint he is to be liable to a penalty:—

Held, that the words "any person" are not confined to the licence-holder or other person whose property the liquor is, but include the barman or other person who does the physical act of transferring the liquor to the purchaser.

Case stated by the stipendiary magistrate for Liverpool.

The respondent was summoned for having sold beer by retail otherwise than in a measure marked according to the imperial standards contrary to s. 69, sub-s. 2, of the Licensing (Consolidation) Act, 1910. (1)

At the hearing the following facts were proved:—

The respondent was a barman in the employ of one J. H. Leedham, who was the licensee of certain licensed premises in Liverpool. The respondent served a woman in the said licensed premises with a quantity of beer being not less than half a pint in a jug without measuring the beer and received payment for it from her. The licensee was not present when the respondent so served the woman and had no knowledge of his having done so.

On behalf of the appellant it was contended that under s. 69 of the said Act the person aimed at was not necessarily the licensee, but might be the person who physically handed over the beer to the purchaser.

For the respondent it was contended that no one but the licensee could be guilty of an offence under the section.

(1) By s. 69 of the Licensing (Consolidation) Act, 1910, sub-s. 1, "All intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, shall be sold in measures marked according to the imperial standards."

Sub-s. 2: "If any person sells or suffers any person under his control or in his employment to sell any intoxicating liquor so as to contravene this section," he shall be liable to a penalty.

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The magistrate held that the respondent's contention was correct and he accordingly dismissed the summons.

A. H. Maxwell, for the appellant. The respondent "sold" the beer to the purchaser within the meaning of s. 69. The words "if any person sells" are of general application and apply to any person who does any act which can be called a sale. They are not confined to the person to whom the liquor sold belongs. Reliance will be placed by the other side on the case of *Williamson* v. *Norris* (1), where it was held that a waiter in the service of the Kitchen Committee of the House of Commons, who served a customer with liquor at a bar in the precincts of the House, could not be convicted of selling liquor without a licence. There the waiter was summoned under s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), which enacts that "No person shall sell . . . . by retail any intoxicating liquor without being duly licensed." The ground of the decision, as appears from the judgment of Lord Russell C.J., was that "the true meaning of the section is that the sale which is prohibited must be a sale by the person who ought to be licensed," and the waiter was obviously not such a person. The case did not turn upon the mere want of ownership of the liquor. In *Boyle* v. *Smith* (2) Lord Alverstone C.J. expressed an opinion that a servant of a licensed person who without his master's authority sold liquor at a place where his master was not authorized by his licence to sell it might be convicted under s. 3 of the Act of 1872 of selling liquor without a licence. In *Hotchin* v. *Hindmarsh* (3) the appellant, who sold on behalf of his master milk which was adulterated, was held rightly convicted under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), which provides that "No person shall sell to the prejudice of the purchaser any article of food . . . . which is not of the nature, substance and quality of the article demanded by such purchaser." Lord Coleridge C.J. in delivering judgment said: "In my opinion a person who takes the article in his hand and performs the physical act of transferring the

(1) [1899] 1 Q. B. 7. (2) [1906] 1 K. B. 432.
(3) [1891] 2 Q. B. 181.

adulterated thing to the purchaser is a person who sells within this section." [He also referred to *Stansfield* v. *Andrews*. (1)]

Rigby Swift, K.C., and *Wimpfheimer*, for the respondent. Where an agent sells on behalf of his principal, the sale is in law by the principal and not by the agent. Thus in *Williamson* v. *Norris* (2), where the defendant sold liquor on behalf of the Kitchen Committee, it was held that the sale was not by him, and that he could not be convicted of selling without a licence. The same thing was laid down in *Dunning* v. *Owen* (3), where it was held that if the owner of the liquor is not duly licensed the fact that the agent who sold it for him was so licensed will afford him no defence to a summons for selling without a licence, the sale in such case being by the principal and not by the agent. The question in each case is whether the servant in so selling acted as a servant or on his own account. If the servant while acting in the scope of his employment does something wrong in connection with the sale the master will be liable to be convicted, and the wrongful conduct of the servant will not make it a sale by him. And if that is the test as to who is the seller under s. 3 of the Act of 1872 (now s. 65 of the Act of 1910), it must equally be the test under s. 69, for the language of the two sections is substantially the same. In *Commissioners of Police* v. *Cartman* (4), where a barman of a licensed person sold his master's liquor to a drunken man, the master was held liable to be convicted under s. 13 of the Act of 1872, Lord Russell C.J. saying "a penalty can only be inflicted on the licensee." In *Williamson* v. *Norris* (2) it was suggested that the defendant there might have been proceeded against under s. 5 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), for aiding and abetting the offence committed by his principals, and it may be that the respondent here might have been charged with aiding and abetting a sale by his master, but he cannot be convicted on this summons, which charges a sale by himself.

Maxwell in reply. The explanation of Lord Russell's dictum in *Cartman's Case* (4) as to the non-liability of the barman is that

(1) (1909) 25 Times L. R. 259.
(2) [1899] 1 Q. B. 7.
(3) [1907] 2 K. B. 237.
(4) [1896] 1 Q. B. 655.

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s. 13, under which the licensed person was there charged, expressly confined the offence to the licensed person, the words of the section being "If any licensed person . . . . sells any intoxicating liquor to any drunken person."

LORD ALVERSTONE C.J. In my opinion this appeal must be allowed. We are dealing with an alleged offence under s. 69 of the Licensing Act, 1910, which corresponds with s. 8 of the Act of 1872. If there is any distinction to be drawn between the two sections I think that s. 69 of the Act of 1910 is wider than s. 8 of the earlier Act. Sect. 69 starts in sub-s. 1 with a general prohibition which does not say anything about the person selling. It says that "All intoxicating liquor which is sold by retail and not in cask or bottle and is not sold in a quantity less than half a pint shall be sold in measures marked according to the imperial standards." I wish to point out that an offence under that sub-section would be committed whenever liquor was sold in breach of its provisions by any one, whoever the seller might be; though a question might arise as to whether such offence was to be treated as a misdemeanour and punished as such. Then sub-s. 2 says "If any person sells or suffers any person under his control or in his employment to sell any intoxicating liquor so as to contravene this section he shall be liable" to the penalties therein specified. Mr. Rigby Swift contends that that means if the licensee sells or suffers any person under his control to sell on his behalf; and he bases his argument upon the decisions which have held that the provision of s. 3 of the Act of 1872 that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed" applies only to the licensee and does not include his agent who carries out the sale. He says that if the words in s. 3 of the Act of 1872—which are I think reproduced in s. 65 of the present Act in practically the same terms—refer only to the licensee because it is his liquor which is being sold, we ought to apply the same construction to the words "if any person sells" in sub-s. 2 of s. 69 and hold that they mean "if any person being a licensee sells." He relies on a passage in the judgment of Lord Russell in *Commissioners of*

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Police v. *Cartman* (1), where he said in reference to that case "It is clear that there is no machinery by which the person actually selling can be convicted; a penalty can only be inflicted on the licensee." But when one comes to look at the section under which the information was there laid, s. 13, it is in terms limited to the licensee. "If any licensed person . . . . sells any intoxicating liquor to any drunken person." Nobody but the licensed person can commit an offence under that section, and it was the licensed person who was summoned in that case, the question in dispute being whether, having forbidden his servants to sell to drunken persons, he could be held liable for the act of his servant in so selling in his absence. Lord Russell only referred to the non-liability of the servant actually selling as a reason for holding the master liable, for otherwise in the majority of cases of such sales no one would be liable at all. On the other side Mr. Maxwell relied on the case of *Hotchin* v. *Hindmarsh* (2) amongst others as pointing in the other direction. There a servant of a dairy company who sold his masters' milk to a customer was held to be a seller within s. 6 of the Sale of Food and Drugs Act, 1875, which provides that "no person shall sell to the prejudice of the purchaser," &c. Lord Coleridge there said: "In my opinion a person who takes the article in his hand and performs the physical act of transferring the adulterated thing to the purchaser is a person who sells within this section." The question is which principle ought to be applied to the section before us, s. 69. The case of *Williamson* v. *Norris* (3) was a case under s. 3 of the Licensing Act, 1872, which says that no person shall sell intoxicating liquors without being duly licensed. The Court thought that the waiter, who handed over the liquor in the House of Commons and took the money, was not a person who could be proceeded against under that section, because the liquor he sold was the property of somebody else who ought or ought not, as the case might be, to have a licence. That case does not seem to me a sufficient authority for us to hold that the sale contemplated by s. 69 is a sale by the licensee only and that nobody else can commit the offence. The section before us is one which deals

(1) [1896] 1 Q. B. 655. (2) [1891] 2 Q. B. 181.
(3) [1899] 1 Q. B. 7.

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with the physical act of drawing liquor from a larger vessel into a smaller, measuring it, and handing it over to the customer, and that is an act which in ninety-nine cases out of a hundred, certainly in the larger public-houses, would be done by the servant and not by the licensee himself. It enacts that an offence shall be committed by any person who sells in contravention of its provisions, and secondly by any one who suffers any other person under his control so to sell; and if the word "sell" were there confined to the transfer of the property in the liquor by the person to whom it belongs the latter limb would have no meaning. Therefore I come to the conclusion that the offence of selling liquor without measuring it may be committed by persons other than the one whose property it is. Further I think that in such a case as the present the servant might be convicted on this summons for aiding and abetting a sale by his master, for he would himself be a principal. But I do not want to base my judgment on that, because I think I ought to say plainly that in my opinion the word "sell" includes something more than the transfer of property by the licensee. The case must go back to the magistrate to be heard.

DARLING J. I am of the same opinion. It seems to me that under this section every person, whether licence-holder or barman, who takes part in the sale of liquor otherwise than by standard measure commits an offence.

AVORY J. I am of the same opinion. The contention for the respondent is that the only person who can be convicted under s. 69 is the licensed person. With that contention I cannot agree. I think that this case ought to be decided upon the same principle as that which was acted upon by the Court in *Hotchin* v. *Hindmarsh* (1), and there applied to similar words in the Sale of Food and Drugs Act, namely, that the person who performs the physical act of transferring the thing to the purchaser is a person who sells within the meaning of the section. In so deciding we are not, in my opinion, deciding contrary to any previous case. With regard to *Williamson* v. *Norris* (2) I think

(1) [1891] 2 Q. B. 181. (2) [1899] 1 Q. B. 7.

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that the whole pith of that case is to be found in the sentence of Lord Russell's judgment (on p. 13) where he says "I am of opinion that the true meaning of the section"—s. 3 of the Licensing Act, 1872—"is that the sale which is prohibited must be a sale by the person who ought to be licensed." I think that those words have no application to the section before us and that the magistrate was wrong in the view that he took. With regard to *Commissioners of Police* v. *Cartman* (1), when one comes to look at the section under which the respondent was charged it is clear that the offence was one which could only be committed by the holder of a licence.

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

Solicitor for respondent: *J. Hands, for E. Berry & Co., Liverpool.*

J. F. C.

[COURT OF CRIMINAL APPEAL.]

1912

Nov. 18.

THE KING *v.* CHANDLER.

Criminal Law—Breaking and entering—Knowledge of Owner of Premises.

The appellant suggested to a servant of the prosecutrix a plan for the commission of a robbery by the appellant at the shop of the prosecutrix. The servant, pretending to agree to the appellant's suggestion, lent the keys of the shop to the appellant, who made duplicate keys, with one of which, on a day arranged with the servant, the appellant unlocked a padlock attached to the outer door and entered the shop, where he was arrested. The prosecutrix had been informed by the servant of the appellant's plan and knew that he intended to enter the shop on the day in question.

The appellant was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein:—

Held, that the conviction was right, notwithstanding that the prosecutrix knew that the appellant had been supplied with the means of breaking and entering by her servant.

Reg. v. *Johnson* (1841) Car. & M. 218, distinguished.

APPEAL against conviction.

The appellant was convicted at the Birmingham quarter

(1) [1896] 1 Q. B. 655.

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sessions on an indictment which charged him with having broken and entered the shop of Henrietta Aaron, a pawnbroker, with intent to steal therein.

The facts were as follows. The appellant made the acquaintance of one Lorie, the business manager of the prosecutrix, and suggested to him a plan by which the appellant would be enabled to commit a robbery at the shop of the prosecutrix. Lorie pretended to agree to the proposed scheme, but in fact informed the prosecutrix and the police authorities of it, and thenceforward he acted under the instructions of the police in the matter. Subsequently Lorie, with the pretended object of assisting the appellant to carry out his scheme, lent him the keys of the shop. The appellant took impressions of the keys in wax, from which he made duplicate keys, and then returned the original keys to Lorie. It was arranged by the appellant with Lorie that the appellant should commit the robbery on July 31. Lorie informed the prosecutrix and the police of this arrangement. On the afternoon of that day, no one then being on the premises, the appellant unlocked a padlock, which secured the outer door, with one of the duplicate keys, and entered the shop. While he was in the shop he was arrested by police officers who had been keeping watch near by.

The ground of appeal was that there was no evidence of any breaking or entering of the shop by the appellant against the will of the owner or at all.

Hugo Young, K.C. (*H. H. Joy* with him), for the appellant. There was no evidence on which the appellant could be convicted of shopbreaking: *Reg.* v. *Johnson*. (1) Although unlocking a padlock would constitute a breaking if it was done against the will of the owner of the premises, yet here it was clearly done with the assent of the prosecutrix, for her servant, to her knowledge, supplied the appellant with keys for the very purpose of enabling him to enter so that he might then be arrested. In *Reg.* v. *Johnson* (1) the prisoners entered the premises through a door which had been left open by the prosecutor's servant, acting in concert with the police, and it was held that in

(1) Car. & M. 218.

consequence the prisoners were not guilty of burglary. There is no difference in principle between intentionally leaving a door open for the purpose of permitting a thief to enter and handing him a key with which he can open a locked door. In both cases the entry is with assent. If a man staying in a boarding-house were to commit a robbery therein after having let himself in with a latchkey supplied to him by the owner of the house, he could not be convicted of housebreaking.

[LORD ALVERSTONE C.J. referred to *Reg.* v. *Lawrance.* (1)]

J. G. Hurst, for the prosecution, was not called upon to argue.

The judgment of the COURT (Lord Alverstone C.J., Channell and Avory JJ.) was delivered by

AVORY J. The question is whether *Reg.* v. *Johnson* (2) is an authority which is applicable to this case. It is clear from the evidence that the prisoner by means of a key with which he unlocked a padlock on a door broke and entered the premises of the prosecutrix, and it is not disputed that he did so with intent to steal. The prisoner therefore prima facie did everything which is necessary to constitute the offence of shopbreaking, but it has been contended that, because the servant of the prosecutrix had furnished the prisoner with the means of getting the key with which he unlocked the padlock, it must be taken that the entry was made with the assent of the prosecutrix, and that the offence of shopbreaking has, therefore, not been proved. In our opinion, although the prosecutrix may have been fully aware of what was going to be done, she did not assent to the breaking and entering of her premises by the prisoner for the purpose of stealing. The keys were only supplied to the prisoner by the servant of the prosecutrix in order that he might be detected in the commission of the offence; that did not make the servant an accomplice of the prisoner, nor make the breaking and entering lawful. It is contended, however, that the case of *Reg.* v. *Johnson* (2) is an authority for saying that in the circumstances of this case the offence of shopbreaking has not been proved. The whole point of the decision in that case is to

(1) (1850) 4 Cox, C. C. 438, at p. 440. (2) Car. & M. 218.

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be found in the following words of Maule J.: "Under the circumstances of this case the prisoners went in at a door which, as it seems to me, was lawfully open. Therefore neither of them was guilty of burglary." The distinction between that case and the present one is that there the prisoners entered the premises through an open door, and therefore there was no breaking, whereas here the prisoner did not walk in at an open door, but broke open the door with a key before he entered, and he did so with the intention of stealing. That distinction appears to us to be sufficient ground for saying that *Reg.* v. *Johnson* (1) is not an authority on the facts of this case, and if that case does not apply, there is no ground for saying that the prisoner was not properly convicted, it having been proved that he did everything necessary to constitute the offence of shopbreaking.

For these reasons this appeal must be dismissed.

Solicitors for appellant: *Philip Baker & Co., Birmingham.*
Solicitor for prosecution: *J. E. Hill, Birmingham.*

(1) Car. & M. 218.

F. O. R.

DEERING & SONS *v.* TARGETT.

1912
Nov. 27.

Shipping—Pilot—Negligence of—Limitation of Pilot's Liability—Insufficiency of Amount to satisfy Claims of Injured Parties—Power to apportion among Claimants—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 620.

Where a Trinity House pilot has been guilty of neglect, and damage has been thereby caused to various persons exceeding in the aggregate the amount of his liability as limited by s. 620 of the Merchant Shipping Act, 1894, the Court has no power to apportion among the injured parties the limited amount for which he is liable, but the party who sues first is entitled, so far as the amount is sufficient for the purpose, and so far as it has not been exhausted by payments properly made to the other parties, to be paid in full.

Appeal from the City of London Court.

The defendant was a qualified pilot licensed by the Trinity House. On January 12, 1912, while the steamship *Batavier V.* was being navigated under his charge she came into collision with the plaintiffs' barge *Atbara*, which, together with the cargo then on board her, suffered damage in consequence. The collision was caused by the negligence of the defendant. The defendant had executed a bond under s. 619, sub-s. (ii.), of the Merchant Shipping Act, 1894, by reason whereof his liability for neglect was limited under the provisions of s. 620 (1) to 100*l.* and the pilotage in respect of the voyage in which he was engaged when he became so liable. The amount of the pilotage in respect of the voyage in question was 2*l.* 10*s.* Claims were made against the defendant by the owners of different portions of the cargo for the damage done to their goods. The defendant agreed the amounts of the said claims, which together came to 257*l.* 12*s.* 4*d.* The plaintiffs having brought this action to recover the sum of 72*l.* 15*s.* 3*d.*, the amount of the damage done to their barge, the defendant admitted liability and paid into Court the sum of 25*l.* as being sufficient to satisfy the plaintiffs' proportion of the

(1) By s. 620 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), "A qualified pilot appointed by the Trinity House who has executed a bond under this part of this Act shall not be liable for neglect or want of skill beyond the penalty of the bond, and the amount payable to him on account of pilotage in respect of the voyage in which he was engaged when he became so liable."

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102*l.* 10*s.*, which was the statutory limit of his liability, if that sum was distributed rateably among the several claimants. Up to the time of the hearing of the action the defendant had not paid to the cargo owners or any of them their proportion of the 102*l.* 10*s.* or any other sum on account of his liability for the damage to the cargo, but he sought to prove admissions of the amounts of the several cargo owners' claims and agreements to pay their respective proportions. The judge was of opinion that although a liability to pay the cargo owners if arising under an order of the Court would afford a pro tanto defence to the action, a liability to pay or even payment otherwise than under such an order afforded no defence. He accordingly held that the plaintiffs were entitled to recover the full amount claimed and not merely a proportion. The defendant appealed.

Maurice Hill, K.C., and *Nelson*, for the defendant. The judge below was wrong in holding that the only valid proof of a legal liability to pay the cargo owners was a judgment. He even thought that actual payment without a judgment ought to be disregarded.

[SCRUTTON J. I agree that he was wrong in that. But the difficulty you have to meet is that, in the absence of parliamentary instructions in s. 620 corresponding to those in s. 504 relating to the limitation of the shipowner's liability, the Court has no power to apportion the fund.]

If payment would be a good defence, a liability to pay must equally be so. And here there was a legal liability, for the defendant had admitted negligence and agreed the amounts of the claims. This is the first case in which the question of the apportionment of the pilot's liability has ever arisen, although the limitation of his liability has existed at least as far back as 1854. The ordinary practice has been for the parties to meet and divide the fund by agreement among themselves. The omission to provide in s. 620 for apportionment by the Court is obviously an oversight. Parliament can never have intended that the pilot should be at liberty to prefer one claimant to the others, or that the one who came to the Court first should get the whole. Such a proceeding would be most unfair, and it would be unseemly

that there should be a scramble for the money. Under the circumstances the Court ought in the exercise of its inherent jurisdiction to do what is fair between the parties and apportion the fund rateably between them.

Roche, K.C., and *H. M. Robertson*, for the plaintiffs, were not called upon.

RIDLEY J. I am of opinion that the Court has no power to apportion the money among the claimants as we are invited by the defendant to do. It would be a very desirable result, no doubt, but I feel that we should be usurping the functions of the Legislature if we were to hold that it could be done. The decision of the Court below must be affirmed.

SCRUTTON J. I am of the same opinion. The Legislature in 1854, and possibly earlier, provided that a qualified pilot should not be liable for neglect or want of skill beyond the penalty of his bond, which is 100*l.*, and the amount payable to him on account of the pilotage in respect of the voyage in which he was so engaged when he became liable, which amount in this case was 2*l.* 10*s.* But the Legislature omitted to insert a provision enabling the Court to receive the amount of the penalty and pilotage and to apportion that sum rateably among the claimants. In an earlier part of the Merchant Shipping Act, 1894, where the owner of a British ship was allowed to limit his liability to 15*l.* a ton or 8*l.* a ton according as there was loss of life or not, Parliament had inserted the provision in s. 504 that the owner may apply to the Court to determine the amount of his liability, and that the Court may distribute that amount rateably among the claimants. Under that provision it is a well-known procedure in the Court of Admiralty for a shipowner, when he expects to be sued for sums far larger than his statutory liability, to bring a limitation of liability action. The Court pronounces that his liability is so much per ton on so many tons; he pays the amount into Court; and the Court then requires the claimants against the shipowner to bring in their claims against the fund, and the fund is apportioned rateably. No such power is inserted in connection with s. 620. The question in this case is whether we can in any

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way exercise such a power. The pilot having been guilty of negligence which gave rise to claims amounting to the sum of 330*l.* 7*s.* 7*d.*, one of the claimants issued a writ against him. The pilot himself desired to divide his liability proportionately among the various claimants, and he paid into Court in the action the sum of 25*l.*, which was rather more than that claimant's proportion of the fund if it were rateably distributed. The question which came before the judge below was whether that was a good defence, it being admitted that the pilot had not paid any other claimant. I wish to say at once that, so far as the judge's observations suggest that the pilot could not get any protection unless he had paid under the order of a Court, and that it was no defence for him to prove any payment otherwise than under such an order, I entirely disagree with that view of the law. In my view it would be a good defence for the pilot to say "I have paid sums amounting to 77*l.* 10*s.* and I have paid them properly, as I will prove; 25*l.* is all that is left to exhaust my liability, and that sum I bring into Court." If the pilot desires to apportion rateably, that would be a way in which it could be done. But putting that aside for a moment, can the pilot say "Your right to recover against me is limited to your rateable proportion of my liability, although I have not at the present time paid any one else"? In my opinion he cannot, and I cannot see any principle upon which the Court can say that it is a good defence. There is no statute providing for it. In most of the cases in which apportionment is allowed—bankruptcy for instance, or shipowner's liability—there is an express statutory provision for it. Is there then any inherent power in the Court, when a fund is in Court to which several people have claims, to divide it among them rateably? I am not aware of any proceeding in equity (and I have had the advantage of consulting some of the greatest masters in equity before saying that) in which the Court so apportions a fund except in administration proceedings. Administration proceedings date from a time when Chancellors were accustomed to do as they thought right. They framed a system of principles upon which a dead man's estate was divided rateably, but that power has not been used in equity in connection with any other class of cases. The only precedent

in admiralty is that for which there is a direct statutory authority in s. 504 of the Merchant Shipping Act. The common law so far as I know has never adopted that principle; it has always acted on the principle of letting people race for the fund. Where there are a number of judgment creditors, and by a stroke of luck some money becomes owing to the debtor from a third person, the creditors race for it, and the one who garnishes the debt first keeps it. It never occurs to the Common Law Courts to say "We will take the fund and distribute it fairly amongst the creditors, because it is just and right that it should be divided proportionately." In the absence of any statutory authority, my view is that if remedy is wanted for this state of things it must be sought in Parliament. I quite agree with what Mr. Hill has said as to the extraordinary inconvenience which will result from letting people race for the pilot's liability. Fortunately there is a Pilotage Bill before Parliament, and, so far as it is proper for me to express it, I hope that steps will be taken to bring this matter before the House with a view to its being dealt with in the same way as the shipowner's liability has been dealt with in s. 504. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for defendant: *Charles E. Harvey.*
Solicitors for plaintiffs: *Keene, Marsland & Co.*

J. F. C.

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Nov. 26.

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Water Rate—Alternative Remedy—Court of Summary Jurisdiction—Court of Competent Jurisdiction—Period of Limitation—Lex Fori—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 145—*Waterworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 74 *and* 85—*Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Waterworks Clauses Act*, 1863 (26 *&* 27 *Vict. c.* 93), *s.* 21—*Metropolitan Water Board* (*Charges*) *Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 3, 33.

By the joint operation of the Waterworks Clauses Act, 1847, ss. 74 and 85, the Railways Clauses Consolidation Act, 1845, s. 145, and the Summary Jurisdiction Act, 1848, s. 11, if any person liable to pay water rate neglect to pay the same, the undertakers may recover the rate if less than 20*l.* by summary proceeding before two justices within six calendar months from the time when the matter of complaint arose.

By the Waterworks Clauses Act, 1863, s. 21, if any person neglects to pay to the undertakers any rate due to them they may recover the same in any Court of competent jurisdiction, and this remedy is to be in addition to their other remedies for the recovery thereof.

Water rates to an amount less than 20*l.* became due and payable to undertakers whose special Act incorporated the Waterworks Clauses Acts, 1847 and 1863. More than six months after the date when the rates accrued due the undertakers brought an action in the county court, as being a Court of competent jurisdiction, to recover them :—

Held, that the remedy in the Court of competent jurisdiction was not subject to the six months' limitation to which summary proceedings before justices would have been subject.

Tottenham Local Board v. *Rowell* (1876) 1 Ex. D. 514, and *West Ham Local Board* v. *Maddams* (1876) 1 Ex. D. 516, note, not followed.

Blackburn Corporation v. *Sanderson* [1902] 1 K. B. 794, followed.

Appeal from the Westminster County Court.

The plaintiffs, the Metropolitan Water Board, sued Mary Elizabeth Winifrede Bunn, spinster, as being the owner of 189, 191, and 193, Mayall Road, Brixton, to recover a sum under 20*l.* in respect of water rate during the eight quarters to September 13, 1908.

The houses in Mayall Road were within the district formerly supplied by the Lambeth Waterworks Company, whose undertaking was by the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), transferred to and vested in the plaintiffs.

The rate for the first six quarters was by s. 6 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), recoverable under the provisions of the Lambeth Waterworks

Act, 1848 (11 & 12 Vict. c. vii.); the rate for the last two quarters was recoverable under the provisions of the Metropolitan Water Board (Charges) Act, 1907.

The proceedings were taken under s. 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), which provides that where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house, the water rate shall be a charge on the dwelling-house, and that the amount may be recovered from the owner or from the occupier in the same manner as water rates may by law be recovered.

The summons was issued in the county court on December 20, 1911.

The defendant gave notice that she intended to rely on the following ground of defence, namely, that the claim for which she was summoned was barred by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 74 and 85, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145, and the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11. (1)

(1) Waterworks Clauses Act, 1847 10 & 11 Vict. c. 17), s. 74: "If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such person, if less than twenty pounds, with the expenses of cutting off the water, and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act; or if the rate so due amount to twenty pounds or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any Court of competent jurisdiction."

Sect. 85: "If the waterworks be in England or Ireland the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act . . . . and such clauses shall apply to the waterworks and to the undertakers respectively, and shall be construed as if the word 'undertakers' had been inserted therein instead of the word 'company.'"

Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145: "Every penalty or forfeiture imposed by this or the special Act, or by any by-law made in pursuance thereof, the recovery of which is not otherwise

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The county court judge held that the effect of those statutes was to bar the claim at the end of six months after it arose, and gave judgment for the defendant.

The plaintiffs appealed.

provided for, may be recovered by summary proceeding before two justices; and on complaint being made to any justice he shall issue a summons requiring the party complained against to appear before two justices . . . . and upon proof of the offence . . . . it shall be lawful for such justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such costs attending the conviction as such justices shall think fit."

Sect. 151 (repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43)): "No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special Act, or any Act incorporated therewith, for any offence made cognizable before a justice, unless the complaint respecting such offence shall have been made before such justice within six months next after the commission of such offence."

Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 21: "If any person refuses or neglects to pay to the undertakers any rate or sum due to them under the special Act, they may recover the same, with costs, in any Court of competent jurisdiction; and their remedy under the present section shall be in addition to their other remedies for the recovery thereof."

Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.):—

Sect. 3: "The following parts of the Waterworks Clauses Act, 1847 (namely):—

"The provisions with respect to the supply of water to be furnished by the undertakers (except sections 35 and 36);

"The provisions with respect to the communication pipes to be laid by the inhabitants;

"The provisions with respect to the payment and recovery of the water rates; and

"The provisions with respect to access to the special Act (sections 90 and 91);

shall (so far as the same are applicable for the purposes of and are not varied by or inconsistent with this Act) be incorporated with and form part of this Act and apply as from the commencement of this Act: . . . ."

Sect. 33: "If any person refuses or neglects to pay to the Board any rate or sum due to them under this Act or any agreement made thereunder they may recover the same with costs in any Court of competent jurisdiction and their remedy under the present section shall be in addition to their other remedies for the recovery thereof."

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Clavell Salter, K.C., and *Ross-Brown*, for the appellants. It may be conceded that, if the appellants had proceeded by information and complaint in a Court of summary jurisdiction, the limit of six months prescribed by s. 11 of the Summary Jurisdiction Act, 1848, would have been an answer to the claim: *East London Waterworks Co.* v. *Charles*. (1) As the law stood formerly, if the water rate in arrear amounted to 20*l.* or upwards it might be recovered in any Court of competent jurisdiction, and the period of limitation applicable in that Court, namely, six years, applied; if the rate in arrear amounted to less than 20*l.*, then it was recoverable in a Court of summary jurisdiction and the period of limitation applicable in that Court, namely, six months, applied. That state of things was altered in the year 1863 by the Waterworks Clauses Act, 1863, which by s. 21 gave water companies power to recover water rate in any Court of competent jurisdiction irrespective of the amount in arrear, and provided that this remedy should be in addition to other remedies for the recovery thereof. This Act was incorporated by the Lambeth Waterworks Act, 1896 (59 & 60 Vict. c. liv.), s. 2. The effect of it is that the Lambeth Waterworks Company, the predecessors of the appellants, could have recovered water rates in any Court of competent jurisdiction. They might have brought an action in the county court or in the High Court at any time within six years after the claim arose. This remedy was to be in addition to other remedies. The other remedies were to cut off the supply of water to the house of the person in default, and to summon him before a Court of summary jurisdiction if less than 20*l.* was due. A further change was made by the Water Companies (Regulation of Powers) Act, 1887, which provided that where the owner and not the occupier was liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company should cut off the water supply for non-payment of the water rate, but that the water rate, without prejudice to the other remedies of the company for enforcing payment thereof from the owner, should, together with interest at the specified rate, be a charge on the dwelling-

(1) [1894] 2 Q. B. 730.

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house in priority to all other charges affecting the premises; and that (without prejudice to the charge) the amount might be recovered, with the costs incurred, from the owner or, on certain conditions, from the occupier for the time being, in the same manner as water rates might by law be recovered: *East London Waterworks Co.* v. *Kellerman.* (1) Water rates might by law be recovered, in the case of the Lambeth Waterworks Company, since 1896 (when they adopted the Waterworks Clauses Act, 1863) by proceeding in any Court of competent jurisdiction. The Metropolitan Water Board (Charges) Act, 1907, s. 33, practically reproduces s. 21 of the Waterworks Clauses Act, 1863, and enacts that if any person refuses or neglects to pay to the Board any rate or sum due to them under the Act or any agreement made thereunder they may recover the same with costs in any Court of competent jurisdiction, and that their remedy is to be in addition to their other remedies for the recovery thereof. Why should that remedy be conditional on the institution of proceedings within six months? Prima facie when a remedy is to be sought in a Court of competent jurisdiction the remedy is subject to the period of limitation for proceedings in that Court as part of the lex fori. The county court judge thought that the present case fell within the principle of *Tottenham Local Board* v. *Rowell* (2) and *West Ham Local Board* v. *Maddams* (3), which were followed in *Vestry of Hammersmith* v. *Lowenfeld.* (4) Those cases turned on the particular statutes on which they were decided. In *Tottenham Local Board* v. *Rowell* (2) the statute was the Public Health Act, 1848 (11 & 12 Vict. c. 63). It was held that the effect of that statute was to give a right and a remedy to be pursued in, and subject to the limitation appropriate to, a Court of summary jurisdiction, and then, in the case of claims below 20*l.*, to permit the plaintiff to pursue the same remedy in the county court, subject to the same limitations. The argument which led the Court to that decision was the absurdity pointed out by counsel for the defendant in *Tottenham Local Board* v. *Rowell* (2), that a sum below 20*l.* might be recovered in a

(1) [1892] 2 Q. B. 72.
(2) 1 Ex. D. 514.
(3) 1 Ex. D. 516, note.
(4) [1896] 2 Q. B. 278.

county court at any time within six years, while a demand exceeding 20*l.*, which could only be enforced before justices, was recoverable only within six months. That case and *West Ham Local Board* v. *Maddams* (1) were both criticized in *Mayor of Leeds* v. *Robshaw* (2), a case which was not cited in *Vestry of Hammersmith* v. *Lowenfeld* (3), which followed the decision in *Tottenham Local Board* v. *Rowell.* (4) *Vestry of Hammersmith* v. *Lowenfeld* (3) was overruled in *Blackburn Corporation* v. *Sanderson* (5), where Vaughan Williams L.J. laid down the guiding principle that, if an Act of Parliament gives power to take a remedy in divers Courts, the remedy will, in each Court, be subject to the lex fori of that Court, and the lex fori includes the limitation of actions, which goes to the remedy and not to the right. It follows that six years and not six months is the period of limitation appropriate to the present case.

Macmorran, K.C., and *Giveen*, for the respondent. It was the intention of the Legislature in enacting the Waterworks Clauses Act, 1847, that claims for water rates, if less than 20*l.*, should be put in suit within six months of their falling due, and not later. This intention might have been effected in divers ways, not necessarily by express enactment. In fact it was effected by providing that the claim should be prosecuted in a Court of summary jurisdiction where it had to be brought within six months after it arose. When the Legislature confers a right and a remedy, providing at the same time that the remedy must be brought within six months, it matters not in what Court the remedy may be sought. In whatever Court it is sought it carries its limitation with it. This is the principle of *Tottenham Local Board* v. *Rowell* (4) and *West Ham Local Board* v. *Maddams* (1), cases which have never been overruled and are founded on good sense and reason. Accordingly, the Waterworks Clauses Act, 1863, did not alter the law; it merely allowed the claim with its limitation to be pursued in any Court of competent jurisdiction. In those days the jurisdiction of the county court was limited to

(1) 1 Ex. D. 516, note.
(2) (1887) 51 J. P. 441.
(3) [1896] 2 Q. B. 278.
(4) 1 Ex. D. 514.
(5) [1902] 1 K. B. 794.

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claims of 20*l.* Therefore claims under 20*l.* in respect of water rates might be brought either in a Court of summary jurisdiction or in the county court, provided the claim was made within six months. Claims over 20*l.* could be brought in the High Court. The principle of *Tottenham Local Board* v. *Rowell* (1) is not affected by a case where there is given a general remedy by action and an additional remedy in a Court of summary jurisdiction, as in *Mayor of Leeds* v. *Robshaw* (2), or by a case where a statute uno flatu gives a remedy in a Court of summary jurisdiction or any Court of competent jurisdiction at the option of the plaintiff, as in *Blackburn Corporation* v. *Sanderson.* (3) Where a statute gives a summary remedy only for the recovery of a sum of money, and a subsequent statute confers an alternative remedy, then, in the absence of express provision to the contrary, the original remedy is to be taken to be subject to the limitation appropriate to the Court of summary jurisdiction, and the subsequent alternative remedy is subject to the same limitation.

Counsel was not heard in reply.

RIDLEY J. This decision cannot be supported. The action was brought to recover eight quarters' rates due quarterly to the Metropolitan Water Board in respect of certain houses at Brixton. The rates for the first six quarters accrued due before the passing of the Metropolitan Water Board (Charges) Act, 1907; the last two became due under that Act. The county court judge held the claim barred by the limitation of six months. The question which we have to decide is whether that period of limitation applies to such a claim as this.

I do not propose to follow all the Acts through in detail. The matter arises in this way. In the Waterworks Clauses Act, 1847, ss. 74 and 85, there are provisions as to the recovery of rates, and the machinery of the Railways Clauses Consolidation Act, 1845, is introduced for that purpose. By s. 145 of that Act procedure before two justices is the method prescribed, the consequence of which is that s. 11 of the Summary Jurisdiction Act, 1848, is introduced and that the proceedings must be

(1) 1 Ex. D. 514. (2) 51 J. P. 441.
(3) [1902] 1 K. B. 794.

commenced within six months. If the matter had rested there the case would have been simple enough. But by s. 21 of the Waterworks Clauses Act, 1863, it is provided that if any person refuses or neglects to pay to the undertakers any rate or sum due to them under the special Act, they may recover the same, with costs, in any Court of competent jurisdiction; and their remedy under that section is to be in addition to their other remedies for the recovery thereof. Next comes the Water Companies (Regulation of Powers) Act, 1887. That Act while enlarging the powers of water companies in one direction limits those powers in another. It takes away from the companies the right to cut off the supply of water in certain cases, but it enacts that where the owner and not the occupier is liable by law or by agreement with the water company, then the water rate shall be a charge on the dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered, with the costs incurred, from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered. That is the material part of that enactment, and it applies to the present case, in which the rate incurred by a former owner is being levied on the present owner.

Finally, there is a similar clause in the Metropolitan Water Board (Charges) Act, 1907. By s. 3 of that Act there are incorporated, among other provisions of the Waterworks Clauses Act, 1847, "the provisions with respect to the payment and recovery of water rates so far as the same are applicable for the purposes of and are not varied by or inconsistent with this Act." Sect. 33 is in the same terms as s. 21 of the Act of 1863, giving a general power to recover water rates with costs in any Court of competent jurisdiction. It provides that the remedy of the Water Board under the present section "shall be in addition to their other remedies for the recovery thereof."

The question is whether the limitation of time in s. 11 of the Summary Jurisdiction Act, 1848, applies where proceedings have been taken in the county court. Mr. Macmorran in an able argument contends that for the recovery of sums under 20*l.* there was originally one remedy and only one given, namely, the remedy in a Court of summary jurisdiction; that subsequently

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there was added a general remedy in any Court of competent jurisdiction; consequently, he argues, the period of limitation applicable to the first remedy must be taken to apply to the second. I do not find any such principle in the decisions, neither can I see any reason for such a principle. In my view, if there be two clauses in the same Act or in different Acts of Parliament, one of which clauses has reference to a Court of summary jurisdiction and gives power to proceed there, and the other of which has reference to a county court or other Court of competent jurisdiction and gives power to proceed there, regard must be had to what is said in each section in order to see whether, when the additional power is given to proceed in the county court or other Court of competent jurisdiction, it is to be subject to those limitations to which the power to proceed in the Court of summary jurisdiction is subject. The first case to be mentioned is *Tottenham Local Board* v. *Rowell.* (1) Mr. Macmorran cited that case in favour of his principle. The claim was for expenses incurred in sewering and paving. The Public Health Act, 1848, gave the local board power to proceed for the recovery of these expenses before justices. Then by a subsequent Act it was provided that proceedings for the recovery of demands below 20*l.*, which local boards were then empowered by law to recover in a summary manner, might at the option of the local board be taken in the county court as if such demands were debts within the cognizance of such Court. That enactment has no parallel in any of the statutes we are asked to construe. In that case the Legislature conferred power to recover expenses by proceedings in a Court of summary jurisdiction; then it conferred power to take those proceedings in a county court as though the claim were a debt within the cognizance of that Court and that Court had jurisdiction to hear it, which but for the enactment it would not have had. There is nothing there to interfere with the general rule that the proceedings are to be taken before justices; there is the mere addition that the same proceedings may also be taken in the county court. That was a very special enactment, and I am not surprised that some difficulty was found in construing it. The Court of Appeal held

(1) 1 Ex. D. 514.

that the limit of six months applied to the proceedings if taken in the county court. "It is right," said Mellish L.J., "to construe these words as meaning that, as long as the right to proceed before justices existed, the right to sue in the county court remained, for then an option might be exercised by the local board. But when the six months had elapsed the right to proceed before justices was gone, and therefore no option could be exercised and the right to sue in the county court was at an end." That passage shews that the enactment in question was of a special and peculiar character. That case came up for discussion in subsequent cases, namely, *Mayor of Leeds* v. *Robshaw* (1) and *Vestry of Hammersmith* v. *Lowenfeld.* (2) If it had not been for the decision of the Court of Appeal in *Blackburn Corporation* v. *Sanderson* (3) a more elaborate analysis of those cases might have been necessary; but in my judgment *Blackburn Corporation* v. *Sanderson* (3) concludes this question. It is true that in that case the sections which had to be construed and compared were sections of the same Act of Parliament; but I cannot see that this is a vital consideration in any way. The corporation had power to proceed under the Summary Jurisdiction Act, 1848, or, if they should think fit, in the superior Courts or any Court of competent jurisdiction. There were two alternatives given. That is not the same as saying that the proceedings which at the passing of this Act are taken in a Court of summary jurisdiction may from henceforth be taken at the option of the plaintiff in another Court: it rather gives an option to pursue a remedy in the Court of summary jurisdiction or to pursue a remedy in the superior Court or any Court of competent jurisdiction. It was on this difference between the effect of the statute in the case of *Blackburn Corporation* v. *Sanderson* (3) and the statute in *Tottenham Local Board* v. *Rowell* (4) that the decision of the Court of Appeal in the later case really turned. I do not overlook the fact that Vaughan Williams L.J. in his judgment pointed out that the right and alternative remedies were given by one and the same Act, which was not the case in *Tottenham Local Board* v. *Rowell* (4) or *West Ham Local Board*

(1) 51 J. P. 441.
(2) [1896] 2 Q. B. 278.
(3) [1902] 1 K. B. 794.
(4) 1 Ex. D. 514.

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v. *Maddams* (1) or in *Vestry of Hammersmith* v. *Lowenfeld.* (2) But in my view the real ground of his decision is the difference in effect between the statutes in either case. Whether the two enactments are in one Act or in several Acts of Parliament, the Court must have regard to the effect of each provision; if we find that there is nothing in the subsequent provision making it necessary to read into it the limitations of the former, then we ought not to import into the latter the limitations and restrictions of the former. The true view is as stated by Vaughan Williams L.J. (3), that the remedy "will, in each Court, be subject to the lex fori of that Court, and the lex fori includes the limitation of actions, which goes to the remedy and not to the right."

Now in the present case the enactments we have to deal with are, first, s. 21 of the Act of 1863. That was passed at the time when the only remedy for the recovery of sums under 20*l.* was by way of summary proceedings before magistrates. The section says "If any person refuses or neglects to pay to the undertakers any rate or sum due to them under the special Act, they may recover the same, with costs, in any Court of competent jurisdiction . . . ." There is not there any reference to proceedings before justices. The enactment continues "and their remedy under the present section shall be in addition to their other remedies for the recovery thereof." That gives the company an option to go to a Court of competent jurisdiction or, if they please, to a Court of summary jurisdiction as theretofore. From such a provision as that it is not to be inferred that the limitation on proceedings before justices is to be imported into proceedings, not before justices, but before other Courts of competent jurisdiction having their own procedure and their own period of limitation. The Act of 1907, if it makes any difference in this respect, makes the case rather stronger for the appellants. Sect. 33 of that Act is practically in the same words as s. 21 of the Act of 1863, but s. 3 enacts that the provisions for the recovery of water rates are only to apply so far as they are not inconsistent with the Act. A

(1) 1 Ex. D. 516, note. (2) [1896] 2 Q. B. 278.
(3) [1902] 1 K. B. at p. 807.

limitation of six months on the recovery of water rates is inconsistent with s. 33, and therefore does not apply. It is inconsistent because, if power is given to prosecute a claim as for a debt in the county court, the matter in dispute becomes subject to the general jurisdiction of the county court with regard to debts, including the limitation of time within which they may be put in suit. The Act of 1887 seems to strengthen this position. Sect. 4 of that Act, under which the plaint was brought, enacts that the amount may be recovered "from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered." If I am right in saying that water rates may be recovered by virtue of the Act of 1863 even after a period of six months has elapsed, they may still be so recovered since the passing of the Act of 1887. If they may be so recovered from the tenant, they may be so recovered from the owner. Mr. Macmorran contended on the ground of hardship that it could not have been the intention of the Legislature that there should be a personal remedy against the owner. But if the Legislature has given such a remedy in clear terms, as I think it has, the argument on the ground of hardship cannot prevail. For these reasons I think the appeal must be allowed.

Scrutton J. I agree. The Metropolitan Water Board sue Miss Bunn for eight quarters' water rate—six quarters having fallen due before the Act of 1907 and two quarters after that Act came into operation. Miss Bunn was an owner who had not herself used the water. Her liability therefore arises under s. 4 of the Act of 1887, which provides that from such an owner the amount may be recovered in the same manner as water rates may by law be recovered. That Act applies to the Metropolitan Water Board, because it applies to every water company which was a trading company supplying water for profit, and to which any of the provisions of the Waterworks Clauses Act, 1847, have been or shall be made applicable, and those provisions have been made applicable to the Metropolitan Water Board, which is the successor to and has the liabilities of the London water companies.

The first question therefore is, How may water rates by law

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be recovered against Miss Bunn? The Act of 1863 provides that "if any person refuses or neglects to pay to the undertakers any rate or any sum due to them under the special Act, they may recover the same, with costs, in any Court of competent jurisdiction." The county court is a Court of competent jurisdiction. To proceedings in the county court there is no six months' limitation. But it is argued that a six months' limitation must be read into the Act of 1863. It is said that by s. 74 of the Waterworks Clauses Act, 1847, the rate due from a person, if less than 20*l.*, is to be recovered in the same manner as any damages, for the recovery of which no special provision is made, are recoverable by that or the special Act; and if it is over 20*l.*, in a Court of competent jurisdiction. The sum in question was under 20*l.* To find out how damages are recoverable "by this or the special Act" the reader must turn to s. 84 of the same Act. From thence he is referred to certain sections of the Railways Clauses Consolidation Act, 1845, which prescribe a tribunal of two justices for the recovery of damages. Then it is said that by s. 11 of the Summary Jurisdiction Act, 1848, two justices cannot hear a claim that is more than six months old. Hence it is inferred that, because it was formerly necessary to have recourse to a tribunal in which proceedings are subject to a limitation of six months, therefore if recourse is now had to the county court a claim more than six months old cannot be recovered, because in some way the limitation of the right to proceed before justices has been imported into the county court. Unaided by authority I could never have discovered how that limitation could be transferred into the county court. Each Court has its own lex fori which includes remedies, limitations, and rules of evidence. When one statute gives a remedy in one Court and another statute gives a remedy in another Court, it does not seem to me to follow that the lex fori of the first Court is imported into the second. It is said that the authorities oblige us to hold that this is the law. I have approached them in the hope that they do not, and on consideration of them I do not think they do, oblige us so to hold.

In *Tottenham Local Board* v. *Rowell* (1) there was a provision

(1) 1 Ex. D. 514.

in the Public Health Act, 1848, that expenses might be recovered in a summary manner, followed by an Act giving an option to recover claims less than 20*l.* in the county court. Nothing was said about payments over 20*l.* It would follow, if the limitation before the magistrates was not transferred to the county court, that in claims over 20*l.* there would be a six months' limitation, while for claims under 20*l.* there would be no such limit. The Court below and the Court of Appeal construed the statute so as to avoid this apparent absurdity, and held that the effect of these particular Acts was to give merely an option to take elsewhere such proceedings as might have been taken before the magistrates. As a decision on those particular Acts the case is an authority binding on this Court. It was cited before a Divisional Court consisting of Lord Coleridge C.J. and A. L. Smith J. in *Mayor of Leeds* v. *Robshaw* (1), an action with regard to the Leeds Improvement Act, 1877 (40 & 41 Vict. c. clxxviii.). There the Act in question provided in one clause that summary proceedings before justices for the recovery of street expenses might be commenced at any time within one year after the work was done; in another clause it enacted that whenever any person should neglect to pay any sum to the corporation, that body might recover the same in any Court of competent jurisdiction for the recovery of debts of the like amount, and that the remedy of the corporation should be in addition to their other remedies. It was contended that the limitation upon the summary remedy applied to the remedy in the Court of competent jurisdiction. A. L. Smith J. seems to have found the same difficulty in understanding *West Ham Local Board* v. *Maddams* (2) that I have found; but that learned judge distinguished that case partly on the ground of the absurdity which I have pointed out, and partly on the ground that the remedies were not given by the same Act.

Another case where alternative remedies were given by the same Act was *Vestry of Hammersmith* v. *Lowenfeld.* (3) There the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), gave a summary remedy; it also gave a remedy in a county court or

(1) 51 J. P. 441. (2) 1 Ex. D. 516, note.

(3) [1896] 2 Q. B. 278.

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in the High Court, so that there was a threefold option. The case of *Mayor of Leeds* v. *Robshaw* (1) was not cited to the Court, which was therefore left exposed to the pressure of *Tottenham Local Board* v. *Rowell*. (2) The Court in my view extended the effect of that case by applying it to a case where the remedies were given in one and the same Act. The effect of that decision would seem to be that if one of the three remedies was subject to a period of limitation, that limitation would extend to the other two. If that case stood alone I should be unable to understand it.

The matter then came before the Court of Appeal in the case of *Blackburn Corporation* v. *Sanderson* (3), where again the two provisions were in the same Act. The Court there said that, in a case where the alternative remedies were given by the same Act, there was no warrant whatever for holding that the lex fori of the first-mentioned Court was transferred into the other Court or Courts. They overruled *Vestry of Hammersmith* v. *Lowenfeld* (4), and so distinguished and explained *Tottenham Local Board* v. *Rowell* (2) that, in my view, it remains an authority only on the particular Acts on which it was decided, and on no others. Those being the authorities, there is nothing compelling me to introduce a six months' limitation into the Act of 1863, but there is every reason for holding that no such limitation is imported into that Act. Therefore, as to the six quarters before the Act of 1907, there is no justification for reading into the Act of 1863 a limitation which primarily applies to the summary remedy given by the Waterworks Clauses Act, 1847. This point affects a very limited and decreasing number of persons. The second point is of general importance. It turns on the Act of 1907. When the Water Board was founded, it was given new powers of charge, or rather its powers of charge were slightly altered and made uniform. That Act contained two provisions; one is s. 33, which is as follows: "If any person refuses or neglects to pay to the Board any rate or sum due to them under this Act or any agreement made thereunder they may recover the same with costs in any Court of competent jurisdiction." The other provision is

(1) 51 J. P. 441.
(2) 1 Ex. D. 514.
(3) [1902]1 K. B. 794.
(4) [1896] 2 Q. B. 278.

s. 3, which provides that "The following parts of the Waterworks Clauses Act, 1847 (namely) . . . . the provisions with respect to the payment and recovery of the water rates . . . . shall (so far as the same are applicable for the purposes of and are not varied by or inconsistent with this Act) be incorporated." Those sections of the same Act afford two remedies, with the proviso that the summary remedy is incorporated if not inconsistent with the other remedy. That brings the case within the decision of *Blackburn Corporation* v. *Sanderson.*(1) Therefore if I had any doubt, which I have not, about the first six quarters' rate, I should have no doubt whatever about the rate for the last two quarters. For these reasons I think the learned county court judge has come to the wrong conclusion, and that the appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *Walter Moon.*
Solicitor for respondent: *E. H. Riches.*

(1) [1902] 1 K. B. 794.

W. H. G.

1912
Nov. 28.

COOMES & SON *v.* HAYWARD.

Practice—County Court—Inspection of Property—"Building in possession of party to action"—Tenants in Common—County Court Rules, 1903 *and* 1904, *Order* XII., *r.* 3.

By Order XII., r. 3, of the County Court Rules, 1903 and 1904, the Court may, upon the application of any party to an action or matter, make an order for the inspection of property as therein mentioned, and for the purpose aforesaid authorize any persons to enter upon or into any land or building in the possession of any party to such action or matter:—

Held, that an order cannot be made under the above rule to inspect the property of several tenants in common, some of whom are not before the Court.

Kearsley v. *Philips* (1883) 10 Q. B. D. 465, followed.

APPEAL from an order of the judge of the Whitechapel County Court.

The plaintiffs, a firm of builders, issued a writ in the High Court against the defendant claiming 30*l.* 7*s.* 11*d.* for work and labour done and materials supplied in respect of repairs to certain houses. The defendant was one of three tenants in common of the houses; his co-tenants were not parties to the action.

An order was made in chambers remitting the action for trial to the Whitechapel County Court.

The registrar of the county court, upon hearing the solicitor for the plaintiffs, made an order that the defendant should permit the plaintiffs, their surveyor or agent and solicitors, at reasonable times in the daytime and on reasonable notice to inspect the premises in question.

The defendant appealed from this order to the judge, who refused to set aside the order of the registrar.

The defendant appealed.

Hilbery, for the appellant. Neither the registrar nor the county court judge had power to make this order. The Order under which the registrar purported to act was Order XII., r. 3, of

the County Court Rules, 1903 and 1904. (1) That rule authorizes inspection of any property and, for that purpose, entry upon or into any land or building "in the possession of any party" to an action. That means in the sole possession of the party: *Kearsley* v. *Philips* (2), a case decided under what was then r. 11 but is now r. 14 of Order XXXI. of the Rules of the Supreme Court, 1883, relating to the production by a party of documents in his possession. It was held that possession meant the sole possession, and that one of two joint tenants could not be ordered to produce documents in the joint possession of himself and the other who was not a party to the action.

Werninck, for the respondents. The case of *Kearsley* v. *Philips* (2) is not in point. The rule of Court in that case was much more limited in its operation than is the rule in the present case. What the Court guards against in refusing production by one only of several joint tenants is the possible injury to interests of persons not parties to the action: *London and Yorkshire Bank* v. *Cooper*. (3) In the present case the appellant was acting as bailiff for all the tenants in common and was in sole charge of the property. [He also cited *Garrard* v. *Edge*. (4)]

Moreover, under Order XII., r. 3, of the County Court Rules

(1) County Court Rules, 1903 and 1904, Order XII., r. 3: "The Court may upon the application of any party to an action or matter, and upon such terms as may be just, make any order for the detention, preservation, inspection, surveying, measuring, or weighing of any property or thing, being the subject of such action or matter, or as to which any question may arise therein, and may for all or any of the purposes aforesaid authorize any persons to enter upon or into any land or building in the possession of any party to such action or matter, and authorize any samples to be taken, or any observation, plan, or model to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

Rules of the Supreme Court, 1883, Order XXXI., r. 14: "It shall be lawful for the Court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

(2) 10 Q. B. D. 465.

(3) (1885) 15 Q. B. D. 7; affirmed in C. A., ibid. 473.

(4) (1889) 58 L. J. (Ch.) 397.

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orders are often made ex parte, as the order in the present case was made. The fact that this power is conferred on the county court precludes such objections as that now raised by the appellant.

Hilbery was not heard in reply.

RIDLEY J. This order cannot stand. It is true that in the case of *Kearsley* v. *Philips* (1) the question arose upon an order for discovery of documents under the rule which was then r. 11, but is now r. 14, of Order xxxi. of the Rules of the Supreme Court, while the present case arises upon an application for inspection of premises under Order xii., r. 3, of the County Court Rules, 1903 and 1904; but there is no difference in principle between that case and the present. In *Kearsley* v. *Philips* (1) the Court of Appeal held that "the right to the production and inspection of documents does not apply to documents which are not in the sole possession or power of the party to the suit who is called upon to produce them, but are only in his possession or power jointly with some other person who is not before the Court." Those words apply to the present case. The county court judge took the view that no injustice would be done in the present case by making the defendant give the desired inspection, because in fact he seems to have been acting as the agent or bailiff of himself and his co-tenants; but that is not enough to entitle the plaintiff to discovery or inspection, because the interest of the defendant's co-tenants is a proprietary interest: see Bray on Discovery, p. 194. They might refuse to allow the inspection, and then the defendant could not give it, and the order of the Court would be futile. The plaintiffs ought to have made the other co-tenants parties to the action. This has not been done, and therefore the appeal must be allowed.

SCRUTTON J. However reasonable and convenient this order might be, there is no power to make it. The action was brought for work and labour done and expended on certain houses. The defendant is tenant in common of the houses with two other

(1) 10 Q. B. D. 465.

persons who are not parties to the action. Questions having arisen as to the necessity and extent of the repairs, and as to what evidence should be adduced, the plaintiffs applied for an order that the houses should be inspected. I learn with surprise that such an order can be obtained in the county court ex parte, so that one party to an action can get an order to inspect the house of another without the latter having an opportunity of being heard. That practice, if it exists, does not commend itself to me. But, be that as it may, there being here two other persons having a proprietary interest in the houses, and not before the Court, the case of *Kearsley* v. *Philips* (1) obliges us to decide that the order under appeal cannot stand. That was a case of wrongful seizure under a power of distress contained in a mortgage deed. The defendants were mortgagees and trustees. Since the seizure, one of the defendants had retired from the trust, and another person, who was not a party to the action, had been appointed in his place. The Court of Appeal held that an order for production of documents could not be made against the continuing trustee, although it was not proved that the new trustee had refused or had even been applied to for production of the documents, and although, for all that appeared, the continuing trustee might have had ample power to produce them. The proper course is to add the other two tenants in common as parties to the action. This appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *A. L. Bryden.*

Solicitors for respondents: *Tatham, Oblein & Nash.*

(1) 10 Q. B. D. 465.

W. H. G.

1912
Dec. 13.

HORTON, APPELLANT *v.* MEAD, RESPONDENT.

Criminal Law—Soliciting for Immoral Purposes—Male Person—Solicitation not reaching Mind of Person solicited—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1, *sub-s.* 1.

By s. 1, sub-s. 1, of the Vagrancy Act, 1898, "Every male person who . . . . (*b*) in any public place persistently solicits or importunes for immoral purposes shall be deemed a rogue and vagabond within the Vagrancy Act, 1824, and may be dealt with accordingly."

The appellant was watched by two police officers on a certain night and was seen to enter certain public lavatories and to remain a few minutes in each. While in the lavatories and also while in the street he smiled in the faces of gentlemen and made certain gestures, but he did not at any time speak to or touch anybody or attempt to do so. No person complained as to his conduct or alleged that he had been solicited, nor was any evidence given that any person had noticed his solicitations except the police officers. The appellant having been convicted under s. 1, sub-s. 1, of the Vagrancy Act, 1898, of having persistently solicited for immoral purposes:—

Held, that it was not necessary in order to convict the appellant to prove that the solicitation reached the mind of the person intended to be solicited so as to attract his notice.

CASE stated by the Court of quarter sessions for the county of London.

The appellant appealed against a conviction by a metropolitan police magistrate for that he, the appellant, on May 31, 1912, did unlawfully persistently solicit for immoral purposes, and was sentenced to ten weeks' imprisonment with hard labour. The quarter sessions confirmed the conviction and dismissed the appeal subject to a case for the opinion of the Court.

The appellant was charged under the Vagrancy Act, 1898, s. 1, sub-s. 1, for that he being a male person did in a public place persistently solicit for immoral purposes.

At the hearing the following facts were proved or admitted.

The appellant was watched by two police officers in plain clothes from 11.10 P.M. to 11.50 P.M. and from 12.5 A.M. to 1 A.M. on May 31 and June 1 respectively.

During that period he entered public lavatories on seven occasions as follows: At 11.10 he entered the public lavatory at

Piccadilly Circus and remained there four or five minutes; he then walked to Leicester Square, where he entered the public lavatory and remained there seven minutes; he then walked to Dansey Yard lavatory and remained there three or four minutes; he then walked back to Piccadilly Circus and entered the same public lavatory as before, remaining there five minutes. He then walked in the direction of Leicester Square, but the officers lost sight of him at the corner of Wardour Street at 11.50. At 12.5 A.M. he was again seen to enter the lavatory at Piccadilly Circus, where he remained a few minutes; he then walked to Leicester Square, where he entered the lavatory and remained a few minutes; he then walked to Dansey Yard, entered the lavatory there, and remained five minutes. He then walked to Leicester Square tube station, where he was arrested. Upon being arrested and told the charge he answered, "Oh dear me, this is very annoying."

While in the said lavatories and also while in the street he smiled in the faces of gentlemen, pursed his lips, and wriggled his body. He did not at any time during this period speak to anybody or touch anybody, nor did he attempt to speak to or touch anybody. No complaint was made by anybody as to his conduct.

No evidence was given of any person who alleged that he had been solicited by the appellant. No evidence was given that any private person had noticed the alleged solicitations but the two officers above mentioned, and two other police officers proved that they had seen the appellant on many occasions during the month of May in the same neighbourhood late at night behaving in a similar manner. On no occasion on the night in question, however, had they seen him speak to or touch anybody or attempt so to do, though on another evening one of the officers saw him in conversation with a man.

At the police station the face and lips of the appellant appeared to be artificially reddened, and in the pocket of the appellant was found a powder puff with pink powder upon it. The appellant gave evidence on oath denying the charge.

At the close of the case for the respondent it was contended on behalf of the appellant that the facts above set out were not

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sufficient in law to substantiate a charge of soliciting under s. 1 of the Vagrancy Act, 1898.

The Court overruled the contention of the appellant, and after hearing the evidence of the appellant and his witnesses dismissed the appeal.

If the Court should be of opinion that the Court of quarter sessions were wrong in law upon the facts aforesaid in dismissing the appeal, then the case was to be remitted to them with the opinion or direction of the Court thereon. But if the Court should be of opinion that the Court of quarter sessions were right in dismissing the appeal, then the appeal was to be dismissed.

Hemmerde, K.C. (*V. R. M. Gattie* with him), for the appellant. There can be no solicitation within the meaning of s. 1, sub-s. 1, of the Vagrancy Act, 1898, unless the solicitation reaches the mind of the person alleged to have been solicited, though it is not necessary to prove that his mind was affected thereby. Therefore the prosecution has to prove that the alleged solicitation reached the minds of some of the persons who were in the public lavatories or in the street; otherwise only an intention to solicit is proved. There was no evidence in the present case that what the appellant is stated to have done reached the mind of any one. In *Rex* v. *Krause* (1) the defendant was charged under s. 4 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), with having solicited, persuaded, endeavoured to persuade, and proposed to one person to murder another, and it was not proved that the letter upon which the prosecution relied as constituting the offence had reached the person alleged to have been solicited, &c. Lord Alverstone C.J. held that there must be some communication to the person alleged to have been solicited, though it was not necessary to shew that his mind had been affected. In *Reg.* v. *Most* (2), which was a decision under the same section, the Court clearly thought that the solicitation must reach the mind of the person intended to be solicited. So too in *Reg.* v. *Fox* (3) the prisoner was indicted under the same section for having solicited and endeavoured to persuade one person to murder another, the

(1) (1902) 66 J. P. 121. (2) (1881) 7 Q. B. D. 244.
(3) (1870) 19 W. R. 109.

prosecution being founded on a letter which never reached the person intended to be solicited or persuaded, and the Court for Crown Cases Reserved in Ireland held that, as the solicitation or persuasion did not reach the mind of the person to whom it was addressed, there could be no conviction. The same principle is laid down in *Reg.* v. *Ransford* (1) and *Rex* v. *M'Carthy*. (2) In the case of a prostitute, the loitering for the purpose of solicitation, to be an offence under s. 54, sub-s. 11, of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), must be "to the annoyance of the inhabitants or passengers." The evidence therefore did not disclose the offence charged against the appellant.

Travers Humphreys, for the respondent, was not called upon.

LORD ALVERSTONE C.J. The appellant was convicted before a metropolitan police magistrate under s. 1, sub-s. 1 (*b*), of the Vagrancy Act, 1898, and the conviction was affirmed by the quarter sessions. That sub-section provides that "every male person who in any public place persistently solicits or importunes for immoral purposes shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly." It is found as a fact that while in the lavatories and also while in the street he smiled in the faces of gentlemen, pursed his lips, and wriggled his body. His face and lips appeared to have been artificially reddened, and in his pocket a powder puff with pink powder upon it was found, not unimportant in connection with an offence of this kind. The only point suggested is that, inasmuch as it was not proved that anybody had seen his solicitation, the magistrate could not convict. I should be sorry to lay down any such rule. A magistrate no doubt always carefully scrutinizes the evidence of those who are watching this class of men; but to say that, because on the particular occasion he does not succeed in attracting the notice of any one, there is no evidence upon which he can be convicted of solicitation is an argument which we cannot adopt. The cases of *Reg.* v. *Fox* (3) and *Rex* v. *Krause* (4)

(1) (1874) 13 Cox, C. C. 9.
(2) [1903] 2 I. R. 146.
(3) 19 W. R. 109.
(4) 66 J. P. 121.

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stand on a different footing. In each of those cases the charge was of soliciting a person to murder another, and the solicitation alleged was by means of a letter addressed to the person said to have been solicited. Obviously, when a letter addressed to a person is relied upon as having a particular effect upon that person, the receipt of the letter by that person must be proved. In my opinion there was ample evidence to support the conviction, and the appeal must be dismissed.

PHILLIMORE J. I am of the same opinion. I understand the point which is relied upon by the appellant to be this, that there cannot be a conviction for solicitation unless it is proved that the solicitation in some way reached the ears or affected the senses of the person solicited. It is not contended that it is necessary that it should produce any influence on the person solicited, but that person must apprehend the solicitation as a fact. I have some doubt, however, whether that point really arises upon the findings in the case. The finding that the appellant smiled in the faces of gentlemen seems to me to shut the point out. Supposing that he smiled in the face of a blind man, perhaps not observing that the man was blind, and that was the only form of solicitation, it might perhaps then be, though there was the intention to solicit, that he could not be convicted of solicitation. It seems to me on the facts stated in the case that we must of necessity draw the inference that what the appellant did was apprehended by the senses of the persons intended to be solicited. In other words, from the fact of his smiling in the face of another person, we ought to draw the inference that it was apparent to that other person if, as we must assume, he had his eyes open. Therefore I doubt whether the point arises. The distinction is obvious between cases of this kind and cases of intercepted letters of solicitation which could not in any way have affected the minds of the persons sought to be affected.

PICKFORD J. I agree. I understand that the only point before us is whether it is necessary for a conviction under s. 1, sub-s. 1 (*b*), of the Vagrancy Act, 1898, that the solicitation should reach the mind of the person intended to be solicited, I do not think that

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it is necessary. I do not think it necessary to discuss other cases decided under other Acts and in other circumstances; under this Act there was evidence upon which the magistrate and the quarter sessions could convict the appellant, and, that being so, it is no part of our duty to inquire whether or not the conviction was right.

Appeal dismissed.

Solicitors for appellant: *J. D. Langton & Passmore.*
Solicitors for respondent: *Wontner & Sons.*

W. F. B.

THE GUARDIANS OF THE SHAFTESBURY UNION, APPELLANTS *v.* BROCKWAY, RESPONDENT.

1912
Dec. 13.

Poor Law—Maintenance—Duty of Husband to maintain Children—Separation Order by Justices—Wife given Custody of Children—Order for Payment of Weekly Sum to Wife—Weekly Sum not paid—Wilful Refusal to maintain Family—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 5.

By s. 3 of the Vagrancy Act, 1824, "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place . . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act."

The respondent, a married man with four children under sixteen years of age, was able wholly to maintain his family by work. By an order of a Court of summary jurisdiction under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, it was ordered that his wife should be no longer bound to cohabit with him, that she should have the legal custody of the children, and that he should pay to his wife the weekly sum of 7*s.* 6*d.* The respondent did not pay any of the weekly sums, and shortly afterwards two of his children under sixteen became chargeable to the union. Upon an information under s. 3 of the Vagrancy Act, 1824, charging him with having wilfully neglected and refused to maintain his family by work, whereby his two children became chargeable, the justices held that owing to the existence of the order giving the wife the custody of the children and ordering the

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respondent to pay her a weekly sum they had no jurisdiction to convict the respondent:—

Held, that the existence of the order under s. 5 of the Act of 1895 did not affect the respondent's legal obligation to maintain his children, and that the order, being disobeyed, was no defence to the charge of wilfully neglecting and refusing to maintain his children.

CASE stated by justices for the county of Dorset.

An information was preferred on behalf of the appellants by their clerk against the respondent under s. 3 of the Vagrancy Act, 1824, for that he, the respondent, being a person able wholly to maintain his family by work, on March 25, 1912, and from thence continually afterwards until the date of the information did unlawfully and wilfully neglect and refuse so to do, by which neglect and default Sidney Brockway, aged twelve, and Cecil Brockway, aged ten, his children whom he was legally bound to maintain, became and from thence remained chargeable to the common fund of the appellants' union.

Upon the hearing the following facts were proved or admitted. The respondent was a person able wholly to maintain his family by work. His two children above mentioned on March 25, 1912, became and from thence down to the date of the information (July 15, 1912) remained chargeable to the common fund of the appellants' union.

By an order of a Court of summary jurisdiction on February 10, 1912, made in pursuance of the Summary Jurisdiction (Married Women) Act, 1895, it was ordered that the wife of the respondent be no longer bound to cohabit with her husband, and that his said wife should have the legal custody of the four children of the marriage whilst under sixteen years of age (including the two children who became chargeable as aforesaid), and that the respondent should pay to his wife the weekly sum of 7*s.* 6*d.* This order had not been varied or discharged. The respondent on application being made to him by the clerk to the appellants had refused to support his said children; he had not paid any sum whatever in discharge of the said weekly payments, nor had he paid any sum to the appellants.

It was contended on behalf of the respondent that as the order under the Summary Jurisdiction (Married Women) Act, 1895,

giving the custody of the children to the wife and ordering the husband to pay the weekly maintenance sum of 7*s.* 6*d.* to the wife, was in force, it was not within the power of the justices to convict the respondent of the offence alleged by the appellants.

It was contended on behalf of the appellants that the existence of the said order did not prevent the respondent from being convicted of the offence alleged by the appellants, more especially as such order had not been complied with in so far as the payment of the weekly sum of 7*s.* 6*d.* was concerned.

The justices were of opinion that owing to the existence of the order under the Summary Jurisdiction (Married Women) Act, 1895, whereby the legal custody of the children had been given to the wife of the respondent and an order had been made for the weekly payment of 7*s.* 6*d.* to the respondent's wife, it was not within their jurisdiction to convict the respondent as an idle and disorderly person under the Vagrancy Act, 1824.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

A. M. Latter, for the appellants. Notwithstanding the order which the wife obtained against the respondent under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, the legal obligation of the respondent under s. 6 of the Poor Relief Act, 1601 (43 Eliz. c. 2), to maintain his children remains. An order under s. 5 (*a*) of the Act of 1895 that a wife is no longer bound to cohabit with her husband has the same effect as a decree of judicial separation on the ground of cruelty; and by s. 26 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), where upon any judicial separation alimony has been ordered to be paid to the wife, and the same is not duly paid by the husband, the latter is liable for necessaries supplied for the wife's use. *Bazeley* v. *Forder* (1) decided that a wife, who was living separate from her husband for reasons which justified her in doing so, and who had the custody of the child of the marriage, and no adequate means of support, had authority to pledge her husband's credit for necessaries supplied to her for the child as being part of her reasonable expenses. The position of the guardians who grant

(1) (1868) L. R. 3 Q. B. 559.

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relief to the children is not affected by an order under the Act of 1895 giving the wife the custody of the children and ordering the husband to pay to her a weekly sum of 7*s.* 6*d.* The husband remains legally liable to maintain the children. Sect. 7 of the Act removes any possible hardship on the husband, because if he has paid the weekly sum to the wife, and she has not maintained the children, he may apply to a Court of summary jurisdiction under that section to vary or discharge the order for the weekly payments. The respondent therefore is legally bound to maintain the two children. He has wilfully neglected and refused to do so, especially in view of the fact that he has not paid any part of the weekly sum of 7*s.* 6*d.* to the wife. The justices therefore were wrong, and the respondent ought to have been convicted as an idle and disorderly person under s. 3 of the Vagrancy Act of 1824. [*Jones* v. *Merthyr Tydfil Union* (1) was also referred to.]

The respondent did not appear.

LORD ALVERSTONE C.J. In this case the justices declined to entertain an information against the respondent for that he, being a person able wholly to maintain his family by work, on March 25, 1912, and from thence continually down to the date of the information did unlawfully and wilfully neglect and refuse so to do, whereby two of his children became chargeable to the union. This is not a proceeding to enforce payment of a sum of money; it is a proceeding to punish the respondent under s. 3 of the Vagrancy Act, 1824, as an idle and disorderly person. A few months before those proceedings were taken, namely, on February 10, 1912, the respondent's wife obtained from a Court of summary jurisdiction under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, an order that she was no longer bound to cohabit with the respondent, that she should have the legal custody of the four children of the marriage whilst under sixteen years of age, and that the respondent should pay to her the weekly sum of 7*s.* 6*d.* The justices seem to have thought that by reason of this order for the custody of the children and for payment to the wife of 7*s.* 6*d.* a week, which sum they considered must have been intended for the benefit of both wife and children,

(1) (1911) 105 L. T. 203; 9 L. G. R. 767.

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Lord Alverstone C.J.

as the existence of the children was known when the order was made, they had no jurisdiction to convict the respondent under s. 3 of the Vagrancy Act, 1824. In my opinion the decision of the justices was wrong. It may be that the non-payment by the respondent of any part of the weekly sum of 7*s.* 6*d.* to his wife may have been one of the reasons, if not the main reason, why his two children became chargeable to the union. But however that may be, the justices have found as facts that the respondent was able wholly to maintain his family by work, and that he had not paid any sum whatever to his wife in discharge of the weekly payments. The existence of the order under s. 5 of the Act of 1895 does not seem to me to affect the respondent's legal obligation to maintain his children, and the existence of that order disobeyed is no answer to the information and does not oust the jurisdiction of the justices to convict the respondent of the offence alleged against him. The case must be remitted to the justices with a direction to convict.

PHILLIMORE J. I am of the same opinion. The justices seem to have been embarrassed by the existence of the order of February 10, 1912, giving the respondent's wife the legal custody of the children and ordering the respondent to pay to her the weekly sum of 7*s.* 6*d.* It seems to me that the existence of that order affords no reason why the respondent should escape from his legal liability to maintain his children. I gather from the case of *Whieldon* v. *Whieldon* (1), which is referred to in Pritchard's Divorce Practice, 2nd ed., p. 12, that the practice of the Divorce Court in ordering permanent alimony to a wife who is given the custody of the children of the marriage is to allot a sum to be paid to the wife, specifying the proportions for the wife and each child respectively. Under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, there is no provision for doing this; there is only power to order payment of a sum of money weekly to the wife. Whether the 7*s.* 6*d.* a week ordered to be paid in this case is considered as a provision for the support of the wife and children or only of the wife I do not know. If it was given merely for the support of the wife it affords no possible excuse

(1) (1861) 2 Sw. & Tr. 388.

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for the husband refusing to maintain his children. If it was given for the support of his wife and children, and if he had paid the money, he might reasonably raise the contention that he had not wilfully refused or neglected to maintain his children, and that his wife ought to have applied part of that sum towards the maintenance of the children. But as he has not complied with the order, no such defence is open to him in answer to the charge of wilfully neglecting and refusing to maintain those two children. The appeal must be allowed.

PICKFORD J. I agree. The order made under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, does not free the husband from his legal obligation to maintain his children. It might be said that the 7*s.* 6*d.* a week ordered to be paid by the respondent to his wife was for the maintenance of his wife and children, and if he had obeyed that order and paid the weekly sum to his wife he might perhaps have had a defence against the charge of wilfully refusing and neglecting to maintain his two children. But inasmuch as he has not obeyed the order, that defence is not available to him. Upon the facts here he has wilfully refused and neglected to maintain his two children whom he is legally bound to maintain, and that obligation is not affected by the order made under s. 5 of the Act of 1895.

Appeal allowed.

Solicitors for appellants: *Busk, Mellor & Norris, for Burridge, Kent & Forrester, Shaftesbury.*

W. F. B.

LIVERPOOL COMPENSATION AUTHORITY, APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

1912
Dec. 17, 18.

Licensing Act—Compensation—Determination by Commissioners of Inland Revenue—Right of Appeal—Compensation Authority—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 20, *sub-s.* 2—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 10.

Where the renewal of an old on-licence is refused by the compensation authority, and, in default of approval by the compensation authority of the amount of compensation agreed upon by the persons interested in the licensed premises, the amount is determined under s. 20, sub-s. 2, of the Licensing (Consolidation) Act, 1910, by the Inland Revenue Commissioners, the compensation authority have no right of appeal against the decision of the Inland Revenue Commissioners.

APPEAL by the compensation authority for the city of Liverpool against the determination by the Commissioners of Inland Revenue of the amount of compensation to be paid to the persons interested in certain licensed premises upon the refusal of the renewal of the licence.

The material parts of the petition of appeal were as follows:—

"1. Your petitioners are the compensation authority for the city of Liverpool within the meaning of the Licensing (Consolidation) Act, 1910 (1), and the Licensing Rules, 1910; and as such

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20:

"(1.) Where the compensation authority refuse the renewal of an old on-licence, a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of the Licensing Act, 1904, and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence), and the value which those premises would bear if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises.

"(2.) The amount to be so paid shall, if an amount is agreed upon by the persons appearing to the compensation authority to be interested in the licensed premises and is approved by that authority, be that amount, and, in default of such agreement and approval, shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal, under section ten of the Finance Act, 1894, to the High Court, as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the

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are, amongst other things, entrusted with the duty of imposing the compensation charges in respect of the area under their control; and are further entrusted with the management of the compensation fund, subject to the provisions of the Act of 1910, and the rules made thereunder.

"2. At the general annual licensing meeting for the city of Liverpool held on February 14, 1911, an objection was raised to the renewal of the full publican's licence attached to premises 42 and 44 Richmond Row in the said city (being an old on-licence within the meaning of the Act of 1910), and the application for the renewal of the licence was adjourned until March 8, 1911.

"3. At the adjourned general annual licensing meeting held on March 8, 1911, the renewal authority within the meaning of the Act of 1910 and the rules decided to refer the question of the renewal of the said licence to your petitioners in accordance with section 19 of the Act.

"4. On April 25, 1911, your petitioners held their preliminary meeting in accordance with the said rules, and at such meeting considered as a whole, with regard to the funds at their disposal and the general circumstances and needs of their area, the report of the renewal authority as to the said licence, and reports on other licences the renewal of which had been referred for their consideration, and decided to proceed upon the report in respect of the said licence.

"5. On May 16, 1911, your petitioners held their principal meeting in accordance with the rules and at such meeting

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persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by the compensation authority.

"(4.) Any costs incurred by the Commissioners of Inland Revenue on an appeal from their decision to the High Court under this section shall, unless the High Court order those costs to be paid by some party to the appeal other than the Commissioners, be paid out of the amount to be paid as compensation."

Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10: "(1.) Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, ... may . . . . appeal to the High Court within the time and in the manner and on the conditions directed by rules of Court . . . ."

refused the renewal of the said licence, and compensation thereupon became payable in respect thereof.

"6. On June 5, 1911, your petitioners held their supplemental meeting in accordance with the rules, and at such meeting decided that no persons, other than the registered owners and the licensee, were interested in the said licensed premises or were persons entitled to compensation upon the refusal of the renewal of the licence.

"7. At the said supplemental meeting the persons entitled to compensation submitted for the approval of your petitioners as the agreed amount to be paid for compensation in respect of the refusal of the renewal of the licence the sum of 3377*l.* 5*s.*" (The figures shewing how this sum was arrived at were set out in the petition.)

"8. Your petitioners having considered the said amount did not approve of the same, but offered to approve of the amount of 1300*l.* as compensation for the licence, which offer was not accepted by the persons entitled to compensation. As there was default of approval of the amount to be paid as compensation as aforesaid your petitioners referred the matter to the Commissioners of Inland Revenue in order that they might determine the amount in accordance with section 20 of the Act of 1910.

"9. On February 5, 1912, the superintending valuer for the Inland Revenue Commissioners, South Lancashire Division, held a meeting at Liverpool to consider the question of the value of the licence, and at such meeting the solicitors for the persons entitled to compensation and the clerk to your petitioners were heard by the valuer as to the amount of compensation to be awarded.

"10. On April 26, 1912, the Commissioners issued their award determining the amount to be paid as compensation on the non-renewal of the licence to be the sum of 2340*l.*"

The petitioners, contending that this amount was excessive and that they were aggrieved by the determination of the Commissioners, and being desirous of appealing to the High Court under s. 10 of the Finance Act, 1894, delivered to the Commissioners a written statement of the grounds of their appeal and filed this petition praying that the determination of the

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Commissioners might be reviewed and set aside, and that it might be declared that the sum of 1300*l.*, or some other sum less than 2340*l.*, was the proper sum to be awarded as the compensation payable on the non-renewal of the licence.

On July 26, 1912, it was ordered by Hamilton J. in chambers "that the question whether the petitioners as a compensation authority are persons aggrieved within the meaning of s. 10 of the Finance Act, 1894, by the decision of the Commissioners of Inland Revenue in the petition referred to, or have a locus standi to appeal from the said decision, or to present the petition herein, be determined by a judge as a preliminary point of law; and that the petition herein be set down for the purpose of such question of law being argued and determined; and that save as aforesaid all further proceedings on the said petition be stayed until the determination of the said question of law; and that the persons interested in the said premises 42 and 44 Richmond Row be at liberty to attend and argue upon the hearing of the said question (such persons to be represented jointly); and that the costs of all parties be reserved to be dealt with by the judge on the hearing."

Sir John Simon, S.-G., and *Lowenthal*, for the respondents. The duty of the compensation authority with regard to the fixing of the amount of the compensation to be paid in a particular case is under s. 20 of the Act limited to approving the sum agreed upon by the persons interested in the premises. If the compensation authority do not approve that sum, the amount of the compensation has to be determined by the Commissioners of Inland Revenue, and the compensation authority have nothing further to do with the matter, except to pay the sum which has been arrived at by the Commissioners to the persons interested. The compensation authority have no locus standi either before the Commissioners or on the hearing of an appeal from the decision of the Commissioners; and neither the Act of 1910 nor the Rules made thereunder contemplate, or make any provision for, an appeal by the compensation authority. By s. 20, sub-s. 2, the decision of the Commissioners is subject to the like appeal as under s. 10 of the Finance Act, 1894, which gives a right of appeal to

a person aggrieved by the decision of the Commissioners with respect to the repayment of excess duty or the amount of duty claimed. The compensation authority are not persons aggrieved within the meaning of that section. Their alleged grievance is that if the Commissioners award too much compensation in a particular case the general fund available for compensation is to that extent unduly depleted and the opportunity of reducing the number of licensed premises is curtailed. That is a grievance common to all persons interested in temperance reform. "Aggrieved" in s. 10 means directly aggrieved by a legal grievance: *Ex parte Sidebotham*, per James L.J. (1); *Rex* v. *Middlesex Justices* (2); *Reg.* v. *Andover Justices* (3); *Drapers' Company* v. *Haddon*. (4) In appeals under the Finance Act, 1894, the Commissioners of Inland Revenue are always respondents. If the appellants' contention is well founded there might be two appeals from the same decision of the Commissioners, one by the persons interested on the ground that the amount of compensation awarded was too small, and another by the compensation authority on the ground that it was too large, and the Commissioners would have to be respondents to both appeals; but if the intention had been that the question as to the amount of compensation was one to be litigated between two opposing parties, the compensation authority and the persons interested, there would have been no object in making the Commissioners respondents to the appeal as they are by the Rules of the Supreme Court (Finance Act), 1895. The provisions of s. 20, sub-s. 4, of the Act of 1910 as to the costs of the appeal also shew that it was never intended that the compensation authority should have the right of appeal. The costs of the Commissioners even if the appellant succeeds are paid out of the amount to be paid as compensation (unless a special order is made on the ground that the Commissioners have acted unreasonably: *In re Hardy* (5)); therefore, if the compensation authority appealed, and the persons interested did not, the costs of the Commissioners might have to be paid by persons who were not parties to the appeal.

(1) (1880) 14 Ch. D. 458, at p. 465.
(2) (1832) 3 B. & Ad. 938.
(3) (1886) 16 Q. B. D. 711.
(4) (1892) 9 Times L. R. 36.
(5) (1910) 75 J. P. 1.

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Rigby Swift, K.C., and *Ross Brown*, for the owners and licensee, adopted the arguments of the respondents.

Sir Alfred Cripps, K.C., and *Wootten*, for the appellants. A consideration of the position and duties of a compensation authority under the Act of 1910 shews that they are the administrators and guardians of a fund which is raised for the purpose of carrying out one of the objects of the Act, namely, a reduction in the number of licensed premises: see s. 21, sub-ss. 4 and 5. At the commencement of each year they have to consider what amount will be available for compensation and how many licences can be taken away. They are therefore directly interested in keeping the compensation payable in each individual case as low as is possible. The compensation authority are in effect trustees of a fund which they have to protect as a public duty, because it is only to the extent of the fund that they can deal with the redundancy of public-houses. If the Commissioners award as compensation a sum which the compensation authority think is too much, they, as trustees of the fund out of which the money is to be paid, are persons "aggrieved" by the determination of the Commissioners. *In re Lamb* (1) shews that under the Bankruptcy Acts the Board of Trade, which has no pecuniary interest in the matter but has a public duty to perform, may be "aggrieved" by a decision of the Bankruptcy Court. *Rex* v. *Glamorgan Justices* (2) is an instance of a compensation authority in their capacity of trustees of the fund taking proceedings to recover money. If the compensation authority are, within the language of the Acts of 1910 and 1894, persons entitled to appeal against the decision of the Commissioners, they cannot be deprived of that right merely by shewing that its enforcement may give rise to difficult questions or anomalies with regard to procedure or costs.

Lowenthal replied.

Cur. adv. vult.

1912. Dec. 18. HORRIDGE J. read the following judgment:— The question in this case is whether or not the compensation authority under the Licensing (Consolidation) Act, 1910, for the

(1) [1894] 2 Q. B. 805. (2) [1910] 1 K. B. 851.

city of Liverpool are persons aggrieved within s. 10 of the Finance Act, 1894. This seems to me to depend upon what is the position of the compensation authority as regards the fixing of the compensation to be paid on the taking away of licences. In my view, if they are to be regarded as an authority who have merely to pay out of their funds the amount fixed by an independent body, namely, the Commissioners of Inland Revenue, they are not a party aggrieved, but if they are entitled to appear as parties before the Commissioners of Inland Revenue and to litigate and contest the amount to be paid in their capacity as guardians of the compensation funds, they are parties aggrieved.

By s. 19 of the Licensing (Consolidation) Act, 1910, provisions are made for the reference to the compensation authority by the licensing authority of licences in respect of which the refusal of renewal is suggested, and the compensation authority are to decide as to the question of renewal, but any refusal to renew is made subject to the payment of compensation, the licences being continued until such compensation is paid. Sect. 20, sub-s. 1, provides for the mode in which the compensation is to be assessed, but no question as to this arises on the argument of the present preliminary point. By sub-s. 2, if the compensation authority approve of the amount asked for and agreed to by the persons collectively interested in the property, that amount is to be the compensation, but in default of such agreement and approval the compensation is to be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal, under s. 10 of the Finance Act, 1894, to the High Court as on the valuation of an estate for the purpose of estate duty. By r. 31 of the Statutory Rules and Orders, 1910, made under the Act of 1910, it is provided that if the amount of compensation money remains to be determined by the Commissioners of Inland Revenue the compensation authority shall send a notice of the fact to the Commissioners of Inland Revenue accompanied by a statement of the names and addresses of the persons entitled to compensation. The form of this notice appears at p. 21 of the Rules and is numbered Form 11.

What, then, is the position of the compensation authority when a matter has been referred to the Commissioners of Inland

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Horridge J.

Revenue? It was contended by Sir Alfred Cripps on behalf of the petitioners that s. 21, sub-ss. 4 and 5, shew that the compensation fund is a fund of which the compensation authority are made trustees, and it is their duty to see that a larger amount is not awarded than what they think right. I do not think there is anything in those sub-sections which is in any way inconsistent with the position that, although they may have certain duties imposed on them, their only duty as regards the actual payment of compensation is, when they have failed to approve the amount themselves, to pay the amount fixed by the Commissioners of Inland Revenue (if not altered on appeal by the parties interested in the licence) out of the compensation funds placed at their disposal. I incline to think that some light is thrown on the subject by the determination of the Commissioners of Inland Revenue having to be made in the same manner and subject to the like appeal as under the Finance Act, 1894, s. 10. Under that Act there is no party in the position of the compensation authority, and the only parties to the appeal are the subject, as appellant, and the Commissioners of Inland Revenue as respondents. If it was intended to have a litigation between the compensation authority and the persons entitled to the licence, I think provision would have been made for the compensation authority to be made respondents in the event of an appeal by the parties interested in the licence, and a corresponding provision for the persons interested in the licence to be respondents on an appeal by the compensation authority. It is admitted on both sides that under the provisions of the Finance Act, 1894, the only appeal that is given in this case is an appeal to which the Commissioners of Inland Revenue are the only respondents. It also seems to me to be important to notice that there are no provisions for the compensation authority appearing before the Commissioners of Inland Revenue on the fixing of the compensation. The only provisions that throw any light upon the procedure before the Commissioners of Inland Revenue are sub-ss. 5 and 8 of s. 7 of the Finance Act, 1894, whereby the value of any property is to be ascertained by the Commissioners in such manner and by such means as they think fit. No doubt the Commissioners of Inland Revenue make proper

inquiries, as shewn in the form produced to me which is sent by them to the compensation authority asking for certain information, but I do not think this is in any way treating the compensation authority as a party to any contest before them. The fact stated in paragraph 9 of the petition that the clerk of the compensation authority did attend before the valuer appointed by the Commissioners of Inland Revenue does not seem to me to affect the legal rights of the parties, as I cannot find anything in the Act or Rules entitling him to so attend.

A further argument on behalf of the Crown was put before me that, inasmuch as s. 20, sub-s. 4, provides that the costs of the Commissioners of Inland Revenue, unless otherwise provided for, shall be paid out of the amount to be paid as compensation, it could never have been intended that there could be an appeal to which the people interested in the licence were not parties, and could not be parties, and upon which the costs of the Commissioners of Inland Revenue are given out of compensation money payable in that particular case. Upon the best consideration I can give to the whole of the Act and the Finance Act, 1894, I have come to the conclusion that the compensation authority are not in any sense of the word parties entitled to litigate the amount of the compensation money settled by the Commissioners of Inland Revenue, and that they are not parties aggrieved within s. 10 of the Finance Act, 1894, but their duty is merely to pay out of the compensation fund such amount as shall be settled by the Commissioners of Inland Revenue subject to the appeal given to persons interested in the licence.

The preliminary question left for my decision must be answered in the negative. I think it follows from this decision that the petition must be dismissed with costs, including the costs reserved by the order of July 26, 1912.

Appeal dismissed.

Solicitors for appellants: *Collyer-Bristow, Curtis & Co., for Edgar C. Sanders, Liverpool.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

Solicitors for owners and licensee: *Godden, Son & Holme.*

F. O. R.

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Nov. 29.

PICKLES, APPELLANT *v.* FOSTER (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Office or Employment of Profit within United Kingdom—Employment exercised wholly out of United Kingdom—Servant of Limited Company—Head Office of "Department"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sched. E, r.* 3; *s.* 147.

By r. 3 of s. 146, Sched. E, of the Income Tax Act, 1842, the duties shall be paid "on all public offices and employments of profit within" the United Kingdom; "(videlicet) . . . . any office or employment of profit held . . . . under any company or society, whether corporate or not corporate." By s. 147, "every person to be assessed for his office or employment shall be deemed to have exercised the same at the head office of the department under which such office or employment shall be held . . . . although the duties of such office or employment shall be performed . . . . within or out of" the United Kingdom.

The appellant entered into a contract in England with a limited company, whose head office was in England and who carried on a trading business in West Africa, to serve the company as their agent in West Africa; his employment and salary commenced from the date of his leaving England for West Africa and continued until the date of his giving up charge of the agency in West Africa. The appellant had a place of residence in England where his wife and children resided during his absence in West Africa, and where he himself resided when he was in England:—

Held, that r. 3 of s. 146 only applied to an office or employment of profit exercised within the United Kingdom, and therefore did not apply to the appellant's employment which was exercised wholly out of the United Kingdom; that the employment of the appellant by the company was not an employment under a "department" within the meaning of s. 147 so as to make him assessable at the head office of the company; and that therefore the appellant was not assessable to income tax in respect of his employment under the company.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for Liverpool.

At a meeting of General Commissioners of Income Tax for Liverpool held on August 7, 1908, for the purpose of hearing appeals the appellant appealed against assessments to income tax of 700*l.* and 1441*l.* for the years 1906-7 and 1907-8 respectively under Sched. E made on him as an employee of the African Association, Limited, whose head office was in Liverpool.

The facts as proved or admitted at the hearing of the appeal before the Commissioners were as follows:—

The appellant had for many years entered into engagements to serve as an employee of the association in West Africa, and on each occasion when he went to Africa he signed an agreement in England. By the agreement dated May 22, 1906 (which was in force from June 2, 1906, to June 30, 1907, and which was in the same form as the previous agreements), and made between the African Association, Limited (therein referred to as the employers), and the appellant (therein referred to as the agent), it was agreed (inter alia):—

"1. The said agent shall proceed to Egwanga, Opobo, West Africa, by the steamship *Fantee* intended to leave Liverpool on or about the 2nd day of June, 1906, and there take charge of the business and property of the said employers at present carried on by and under the care of Mr. T. Scott Rogerson at Egwanga factory aforesaid, and/or any other agency to which he may from time to time be appointed by the said employers."

"2. The said agent shall, as and from the date of leaving Liverpool for Africa, become and be and continue for two years, or until the date of his giving up charge, in the service and employment of the said employers as agent for them at Egwanga factory or elsewhere on the coast of West Africa or the rivers thereof, subject nevertheless to the proviso hereinafter contained for determining such employment, the said employers reserving to themselves the right to terminate this engagement at any time they may desire to do so."

"2A. In the event of the said agent asking to come home for a holiday after the expiration of twelve months, the said employers agree to favourably consider such request."

Clause 4 provided that the agent should devote the whole of his time and services to the business of the employers, and should forward monthly to their Liverpool office account sheets of trade and half-yearly stock sheets and statements of account, and should act in every respect according to their instructions, and should not during the continuance of the agreement absent himself from their service, nor barter or trade in any manner whatever

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directly or indirectly, except on the employers' account and in pursuance of orders given to him.

"6. In consideration of his faithful service and due performance of all the conditions hereof the employers agree to pay the agent a fixed salary of 300*l.* per annum, commencing from the date of his sailing for Africa, as hereinbefore mentioned, and terminating on the day he shall from any cause give up charge of their agency on the African coast. During his continuance in their service in Africa the employers shall provide the agent with board, lodging, washing, and when procurable with medicine and medical attendance. In the event of unavoidable sickness necessitating (in the opinion of the medical officer of the employers) the return of the agent to England, the employers shall defray the cost of his homeward passage; but on his recovery, it shall be at the employers' option to require him at their cost to return to the coast and complete the term of this agreement."

Clause 7 provided for the payment to the agent of a further sum by way of commission equal to a certain percentage of the net profits derived by the employers from their trading business at all the stations on the Opobo river during the period of the agent's employment at Egwanga; and by clause 9, "the said commission shall be based upon a statement of accounts of the business transacted by the employers in the Opobo river, such statement to be made up by the accountant of the employers," and in ascertaining the amount of the net profits certain specified charges were first to be provided.

"11. Nothing herein contained shall be held or deemed to amount to an agreement for partnership between the parties hereto, it being the sole and true intent of the said parties to create between them the relation of master and servant only and not that of partner, and this agreement, and every clause, matter, and thing herein contained shall be read and construed accordingly."

The appellant was a British subject, and when not abroad on the company's business had resided for many years in the United Kingdom. He took a lease of a house first at Rochdale from November, 1903, to December, 1907, and from that date he took a

lease and still leased a house at Blackpool as a residence for his wife and family, and he resided at both places himself when in England. During the whole of his absence his wife and children continued to reside at his residence either at Rochdale or at Blackpool. He was the rated occupier of those houses and paid the rates.

Under the agreement of May 22, 1906, the appellant left Liverpool for Africa on June 2, 1906, from which date the fixed salary of 300*l.* per annum under the agreement commenced. In addition to the said salary he was entitled under clause 7 of the agreement to the percentage therein specified of the net profits derived by his employers from their said business on the Opobo river from the date of his taking charge of the business to the date of his surrendering such charge, namely, on June 30, 1907. One half of the appellant's salary was paid in accordance with his desire to his wife in England; the other half was paid part by bill drawn by the appellant in Africa on his employers in England and payable on acceptance at Parr's Bank, London, part in goods or cash in Africa, and the balance on his return to England.

The employment of the appellant under the agreement terminated on June 30, 1907, and shortly after the stocktaking of that date he left Africa for England. None of the said commission was paid in Africa, but all of it was paid to him on his return to England by cheque drawn on a bank in Liverpool. The appellant remained in England until November 28, 1908, when he again left for West Africa under a new agreement similar to that above set out.

From the termination on June 30, 1907, of the former to the commencement on November 28, 1908, of the latter agreement the appellant was not employed by the African Association, and received no pay except as above mentioned unless and until he was again engaged to go out to Africa. Though under no obligation to do so, it had been the practice of the association to make a payment to the appellant, if unemployed for more than six months continuously, in consideration of his entering upon a fresh term of service. The amount of this extra payment was calculated at the rate of 12*l.* 10*s.* a month for the period beginning

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six months after the end of the immediately preceding term of service and ending on the day before his sailing from Liverpool under a new agreement. In pursuance of this practice the association paid to the appellant at Liverpool on or about November 28, 1908, a lump sum of 136*l.* 5*s.*, applying the above-mentioned basis of calculation to the period beginning on January 1 and ending on November 27, 1908. The appellant stated that he looked upon the payment as a bonus to keep himself open and not accept employment from another firm.

The appellant contended that he did not hold any office or employment of profit within the jurisdiction of the Commissioners for Liverpool or within the United Kingdom; that, as his employment under the association was exercised wholly out of the United Kingdom, it did not come within the description of offices to be charged under Sched. E as enumerated in s. 146 of the Income Tax Act, 1842, r. 3 (1); that s. 147 of the Act, on which (inter alia) the surveyor of taxes relied, did not apply to the servants of a limited company, but to officers serving under the British Government; and that it was contrary to the general practice of

(1) 5 & 6 Vict. c. 35, s. 146: "The duties hereby granted contained in the Schedule marked (E.) shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment."

Rule 3: "The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain" (now by s. 5 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the United Kingdom); "(videlicet) . . . . any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate . . . ."

Sect. 147: "Every person to be assessed for his office or employment shall be deemed to have exercised the same at the head office of the department under which such office or employment shall be held, and shall be rated for such office or employment as if exercised at such head office, although the duties of such office or employment shall be performed, or the profits or any part thereof arising from such office or employment shall be payable elsewhere, within or out of Great Britain" (now the United Kingdom.)

Sched. E in s. 2 of the Income Tax Act, 1853, now replaces Sched. E in the Income Tax Act, 1842; and by s. 5 the duties thereby granted are to be assessed and raised under the regulations and provisions of the Income Tax Act, 1842.

Income Tax Commissioners to assess offices not exercised wholly or partly in the United Kingdom.

It was contended (inter alia) on behalf of the Crown that the Commissioners had jurisdiction, that the appellant was in the employment of the association, that the appellant was resident in this country, that the greater part of his remuneration was actually received here, and that the assessments were correctly made, and s. 147 of the Income Tax Act, 1842, was referred to.

The Commissioners were of opinion that the contentions on behalf of the Crown were right, and confirmed the two assessments subject to adjustment of the amounts.

Raymond Asquith (*Danckwerts, K.C.*, with him), for the appellant. The appellant's employment in West Africa, having been exercised wholly outside the United Kingdom, does not come within s. 146, r. 3, Sched. E, of the Income Tax Act, 1842, and the appellant is not assessable under that schedule. Rule 3 provides that the duties "shall be paid on all public offices and employments of the description hereinafter mentioned within Great Britain" (now by s. 5 of the Income Tax Act, 1853, the United Kingdom), and the only description under which the present case can come is any office or employment of profit held under any company or society, whether corporate or not corporate. An office or employment exercised wholly outside the United Kingdom is not within the enactment. "Within Great Britain" means exercised within Great Britain. The appellant's employment began when he left Liverpool and terminated when he gave up charge of the agency in West Africa. His salary was only payable during that period. He is therefore not assessable to income tax under Sched. E in respect thereof, and this is the only schedule which is applicable to such a case: *Tennant* v. *Smith*. (1) The only way in which locality can be assigned to an office or employment is by ascertaining where the office or employment is exercised. The locality of exercise is the locality of the office or employment. Therefore the natural interpretation of the words "within Great Britain" is "exercised within Great Britain." This is made clear by other sections of the Act.

(1) [1892] A. C. 150, at p. 160.

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Sects. 30 and 31 provide for the appointment of Commissioners for executing the Act in relation to certain public offices, and with regard to the locality of the jurisdiction of the Commissioners the proviso in each of those sections enacts that if no Commissioners are appointed before a certain time the Commissioners for executing the Act in relation to the duties on lands and tenements shall in their several districts execute the Act in relation to the duties on offices and employments "exercised within the same districts respectively." Therefore the physical locality where the office or employment is exercised is that which gives the Commissioners fiscal jurisdiction over it. Sect. 4 deals with the appointment of Commissioners for general purposes and assigns them districts. Sect. 147, which provides that "Every person to be assessed for his office or employment shall be deemed to have exercised the same at the head office of the department under which such office or employment shall be held, and shall be rated for such office or employment as if exercised at such head office, although the duties of such office or employment shall be performed . . . . within or out of Great Britain," is limited to an office or employment under a "department," that is, a Government department, and introduces a constructive or artificial locality in respect of an officer in the employment of the Government, who is to be deemed to be employed at the head office of the department to which he belongs. A limited company such as the African Association is not a "department." That section therefore is not applicable. It shews, however, that when the Legislature intended to tax the profits of a particular office or employment exercised outside the United Kingdom it did so in express terms. The agents abroad of an English company may be foreigners, and it would be extraordinary if the Act touched them. With regard to the 136*l.* 5*s.* paid to the appellant for the period from January 1, 1908, to November 27, 1908, that sum was paid in consideration of the appellant's entering upon a fresh term of service. There was no agreement of service and the appellant was not employed by the company during that time. He cannot therefore be assessed under Sched. E.

W. Finlay (*Sir Rufus Isaacs*, *A.-G.*, with him), for the respondent. The Crown for the purposes of this case does not contend

that the payment of 12*l.* 10*s.* a month for the period beginning six months after the end of the preceding term of the appellant's service and ending on the day before his sailing from Liverpool under a new agreement of service—namely, from January 1 to November 27, 1908—shews that the employment of the appellant by the association was partly exercised within the United Kingdom. In view of the finding in the case that from the termination on June 30, 1907, of the agreement of service to the commencement on November 28, 1908, of the new agreement of service the appellant was not employed by the association, it is not contended that there was an employment within the United Kingdom. The Crown will argue the case upon the assumption that the payments were made for services wholly rendered out of the United Kingdom. Rule 3 of s. 146 of the Income Tax Act, 1842, defines the offices and employments of profit which are to be chargeable with the duties under Sched. E. Some of those offices or employments may obviously be exercised out of the United Kingdom, namely, the employment of an officer in the Navy or Army. Rule 3 is very wide and general in its terms and applies to "all public offices and employments of profit of the description" thereinafter mentioned; and s. 147, which applies to "every person to be assessed for his office or employment," ought to be construed as including all the offices and employments mentioned in r. 3. Those words in s. 147 are perfectly general. If that is so, the office or employment is to be deemed to be exercised at the head office of the department under which the office or employment is held. The word "department" in s. 147 is not limited to a Government department as contended for by the appellant; it includes every corporation or body of persons mentioned in r. 3. The appellant here had a residence in the United Kingdom where his wife and family resided when he was in West Africa and to which he returned when he came back to this country. The contract of employment was made at Liverpool with an incorporated company whose head office was at Liverpool. Rule 3 ought to be construed as including an employment of that kind, and s. 147 gets over the difficulty as to the place where the person so employed shall be assessed by directing the assessment to be at the head office of the company.

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Sect. 148, which is now repealed, lends force to this argument, because in 1842 Ireland was outside the Income Tax Act, and yet it was thought necessary specially to exempt from income tax all public offices and employments the duties whereof were necessarily and permanently performed in Ireland. If the contention of the appellant were correct that section was unnecessary. [*Partington* v. *Attorney-General* (1), *Coltness Iron Co.* v. *Black* (2), and *Tennant* v. *Smith* (3) were referred to with regard to the construction of taxing Acts.]

Danckwerts, K.C., in reply. The contention of the Crown is that the Court should give an equitable construction to the word "department" in s. 147, and it is thus asked to violate the rule of construction of taxing Acts laid down by Lord Cairns in *Partington* v. *Attorney-General.* (1) With regard to s. 148, the reason for that section is this. Sect. 147 would have brought within the Act a person who exercised a public office or employment in Ireland where the head office of his department was in England. Inasmuch, however, as persons resident in Ireland did not pay income tax it was thought right to exempt persons resident in Ireland from paying income tax where the duties of the office or employment were necessarily and permanently performed there.

HORRIDGE J. This case raises a question of some difficulty. Rule 3 of s. 146, Sched. E, of the Income Tax Act, 1842, provides that "the said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain," now the United Kingdom. In my opinion that means, especially having regard to ss. 30 and 31 of the Act, public offices and employments of profit exercised within the United Kingdom. Unless, therefore, there is something to bring this particular case within the category of offices or employments of profit exercised within the United Kingdom, I do not think that the appellant is liable to pay income tax in respect thereof. The only words of r. 3 within which the appellant's employment can come are "any office or employment of profit held . . . .

(1) (1869) L. R. 4 H. L. 100, at p 122. (2) (1881) 6 App. Cas. 315, at p. 330.
(3) [1892] A. C. 150, at p. 154.

under any company or society, whether corporate or not corporate." The appellant's employment was admittedly exercised wholly out of the United Kingdom. The question therefore is whether that class of office or employment of profit is brought within the provisions of s. 147 so as constructively to make the office or employment one which is exercised within the United Kingdom, though the duties thereof are in fact wholly performed out of the United Kingdom. The Crown relies upon the opening words of s. 147 and says that they include all servants of companies. Sect. 147 is a section dealing with the mode of assessment, and the words "every person to be assessed" taken apart from what follows would mean every person who comes within the description in r. 3 of s. 146 with the limitation I have mentioned, namely, that the person to be assessed exercises his office or employment within the United Kingdom. The section, however, when taken as a whole may properly be read and given effect to as applying only to offices and employments with reference to which the expression "department" may properly be used, and whether such offices or employments are exercised within or out of Great Britain, provided there is a head office of the department within Great Britain. It seems to me that the expression "department" in s. 147 has a well understood meaning, and that the servants of a company which carries on such a business as this company does cannot be said to be employed under a department. I do not think that I ought, as between the Crown and a subject, to stretch the meaning of the word "department" so as to bring within the provisions of the section a person who does not naturally and properly come within the description of a person exercising an office or employment under a department. The appellant therefore is not assessable, and the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Vernon, Stephen & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. F. B.

1912
Dec. 18, 19.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* EARL FITZWILLIAM, RESPONDENT.

Revenue—Reversion Duty—Determination of Lease—Total Value of Land—Licensed Premises—Value of Licence—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13; *s.* 25, *sub-ss.* 1, 3.

In estimating the total value of land for the purpose of assessing the reversion duty payable under s. 13 of the Finance (1909-10) Act, 1910, on the determination of a lease, the fact that premises on the land are licensed for the sale of intoxicating liquor, and that the value of the land is thereby enhanced, is an element to be taken into consideration.

APPEAL under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, by the Commissioners of Inland Revenue from a decision of a referee.

The facts which had been agreed were, so far as material, as follows: By a lease dated November 7, 1861, a piece of land, together with the messuage or tenement shop and outbuildings which were then, or at any time thereafter during the term should be erected, on the premises, was demised by the then Earl Fitzwilliam (the respondent's predecessor in title) to one Jackson for a term of fifty years from April 6, 1861, at the yearly rent of 4*l.*

A messuage erected by the lessee on the land was ultimately licensed, and at the date of the expiration of the term on April 6, 1911, the lease had become, and then was, vested in a brewery company, and the house was occupied by, and the licence was in the name of, a tenant or manager of the brewery company.

After the determination of the lease the respondent rendered the necessary account for the purpose of having reversion duty (1)

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 13:

"(1.) On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value.

"(2.) For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of

assessed, in which the estimated total value of the land at the date of the original grant of the lease was put at 120*l.*, which figure was accepted by the authorities. The respondent estimated the total value of the land at the determination of the lease at 300*l.*, being on the basis of twenty years of an assumed gross rental of 15*l.* a year which the property would produce if the house was unlicensed, and the estimated value of the benefit accruing to the lessor at the determination of the lease was put at 180*l.*, being the difference between 300*l.* and 120*l.*

It was agreed that the total value of the property at the determination of the lease, if the house was unlicensed, was 300*l.*, and that the total value of the property, including the value of the licence, was 500*l.* The licence in question was an old on-licence within the meaning of the Licensing (Consolidation) Act, 1910.

On June 8, 1911, the respondent received a notice of assessment and to pay the reversion duty (Form 137, Land) in which the total value of the property was stated at the sum of 500*l.*, the total value at the date of the lease at 120*l.*, and the value of the benefit accruing to the lessor at 380*l.*, and duty amounting to 38*l.* was demanded. The respondent appealed to the referee against the assessment.

Mr. Howard Martin, the referee duly authorized in that behalf, gave his decision in respect of the appeal in the following terms:—"The value of the licence to use the dwelling-house on the land in question as a public-house ought not to be included in the total value of the land, and should not therefore be

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this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease and of all compensation payable by such lessor at the determination of the lease, exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property), but, where the lessor is himself entitled only to a leasehold interest, the value of the benefit as so ascertained shall be reduced in proportion to the amount by which the value of his interest is less than the value of the fee simple."

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considered as an element in determining the value of the land for the purpose of assessing reversion duty."

The Commissioners of Inland Revenue appealed against this decision.

W. Finlay (*Sir John Simon, S.-G.*, with him), for the appellants. By s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, the benefit accruing to a lessor by reason of the determination of a lease shall be deemed to be the amount by which the total value of the land at the time the lease determines exceeds the total value of the land at the time the lease was granted. By s. 25, sub-s. 3, "the total value of land means the gross value" less certain deductions; by sub-s. 1 "the gross value of land" means the amount which the fee simple if sold in the open market, free from incumbrances, might be expected to realize. For the purpose of reversion duty, therefore, the total value of the land is the market price. Land includes the baildings on the land, and it is notorious that licensed premises realize more than the same premises would realize if unlicensed. The distinction is recognized in this very Act—see s. 44, sub-s. 2—and in s. 20 of the Licensing (Consolidation) Act, 1910. The principle applicable to this case is the same as that which is applied in rating cases, substituting price for rent, and in rating cases the enhanced value of premises due to the fact of their being licensed is always taken into consideration: *Cartwright* v. *Sculcoates Union* (1); *Rex* v. *Shoreditch Assessment Committee*. (2) Sect. 25, sub-s. 4 (*a*), of the Act of 1910 expressly provides that, in arriving at the assessable site value of land, any part of the total value which is directly attributable to goodwill or any other matter which is personal to the owner or occupier is to be deducted. The absence of any similar provision in s. 13 shews clearly that for the purpose of reversion duty the value of the licence forms part of the value of the land.

Sir Alfred Cripps, K.C., and *Wootten*, for the respondent. It is not denied that the expression "land" in Part I. of the Act includes buildings on the land, but the reversion duty is a duty on land values, and the intention of the Act was to tax realty as

(1) [1900] A. C. 150. (2) [1910] 2 K. B. 859.

distinguished from personalty. Neither the words "total value of the land" nor the word "land" as used in the Act include the value of a licence to sell intoxicating liquors. A licence is a personal grant to the licensee and forms part of the goodwill of the business carried on at the premises in respect of which the licence is granted: *Rutter* v. *Daniel* (1); *Whitley* v. *Challis* (2); *In re Bennett.* (3) There is a clear distinction between the value of land and the value of the goodwill of a business carried on upon the land: *Cox* v. *Harper.* (4) The referee, therefore, rightly held that, in estimating the total value of the land for the purpose of reversion duty, the increased value due to the existence of the licence was not a factor which could be taken into consideration. [*Laceby* v. *Lacon* (5) and *West London Syndicate* v. *Commissioners of Inland Revenue* (6) were also cited.]

Cur. adv. vult.

1912. Dec. 19. HORRIDGE J. read the following judgment:— The question in this case arises under s. 13 of the Finance (1909-10) Act, 1910, which provides for the payment on the determination of any lease of land of a duty on the value of the benefit accruing to the lessor by reason of the determination of the lease. The lease in this case was one by the then Earl Fitzwilliam (the respondent's predecessor in title), dated November 7, 1861, for a term of fifty years from April 6, 1861, and the reversion on which fell in in April, 1911. At the time of the lease the property was unlicensed, but before the reversion fell in a licence had been granted. It is agreed that the total value, at the determination of the lease, of the property without the licence was 300*l.*, and with the licence 500*l.* Mr. Howard Martin, the referee, gave his decision that the value of the licence to use the dwelling-house on the land in question as a public-house ought not to be included in the total value of the land, and should not, therefore, be considered as an element in determining the value of the land for the purpose of assessing reversion duty. The petition before me asks that it

(1) (1882) 30 W. R. 724, 801.
(2) [1892] 1 Ch. 64.
(3) [1899] 1 Ch. 316.
(4) [1910] 1 Ch. 480.
(5) [1899] A. C. 222.
(6) [1898] 2 Q. B. 507.

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Horridge J.

should be declared that 500*l.* was properly fixed by the Commissioners as the value of the said premises on the footing that the licence ought to be taken into consideration.

In the case of *Cartwright* v. *Sculcoates Union* (1) Lord Davey, referring to the property in that case, which was a rating case in respect of public-house property, uses these words: "My Lords, I conceive it is that" (meaning the true principle) "which is stated by Lord Blackburn in *Mersey Docks* v. *Liverpool*. (2) The passage is quoted in the judgment of Collins L.J., but I will take the liberty of beginning to read a little earlier. 'If the hereditaments,' he says, 'are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business.' I say, my Lords, in answer to a suggestion that was made from the bar, that in my opinion Lord Blackburn there was laying down a general principle applicable to all such cases, and not merely one that applied only to exceptional cases, where there is no market value or price or letting rent to which you can refer. And, my Lords, I venture to think that that is founded upon common sense." This house owing to its licence would afford facility for carrying on a public-house and command a better rent. In the case of *Rex* v. *Shoreditch Assessment Committee* (3) Cozens-Hardy M.R. says: "The case of *Cartwright* v. *Sculcoates Union* (4) in the House of Lords decides that takings and profits of a licensed house may be taken into account in arriving at gross value. The hypothetical tenant would certainly be less willing to pay the old rent if he knew that an inevitable—not an optional—deduction of 95*l.* a year from the profits would in future have to be made. The licence is not like a gun licence or a dog licence. Though granted to an individual, it is only granted to him as occupier of this particular

(1) [1900] A. C. 150, at p. 158.
(2) (1873) L. R. 9 Q. B. at p. 97.
(3) [1910] 2 K. B. at p. 876.
(4) [1900] A. C. 150.

house. It is the possession of the licence which gives an increased value to the occupation of the house, and anything which makes that licence more costly must tend to diminish that increased value." And Farwell L.J. says (1): "It is not (as Channell J. points out in the Divisional Court) like the duty on the sale of tobacco: the tobacconist's shop is not valued as such: the licensed premises are, because the licence is not ambulatory, but is confined to a specific trade at a specified place." It is said that the authorities I have referred to are rating authorities, but the inquiry in such cases is what rent a hypothetical tenant would pay, and clearly the capital value depends largely on the rent obtainable for the premises.

In this case I think clearly the referee ought to have taken into account the increased value owing to the licence in considering the benefit accruing to the respondent, and I think that 500*l.* was properly originally fixed as the value of the premises.

This appeal must be allowed with costs.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitor for respondents: *C. E. Pullon, for H. W. & R. Pearson & Russell, Malton.*

(1) [1910] 2 K. B. at p. 882.

F. O. R.

1912
Dec. 2, 4.

REITH *v.* GOVERNING BODY OF WESTMINSTER SCHOOL.

Revenue—House Duty—School Buildings—"Offices belonging to any dwelling-house"—House Tax Act, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B*, *r.* 2.

Rule 2 of Sched. B to the House Tax Act, 1808, provides that "offices . . . . belonging to and occupied with any dwelling-house" shall for the purposes of inhabited house duty be valued together with the dwelling-house:—

Held, that "belonging to" means "exclusively belonging to," and that it is not enough that the offices, although in the same occupation as the dwelling-house to be assessed, should belong to that dwelling-house in common with certain other dwelling-houses in other occupations.

The school buildings of a public school consisted of a residential building in which the foundation scholars resided, and which was used exclusively by them, and a building, structurally disconnected from it, containing a school room, class rooms, library, &c., which were used by all the boys attending the school, foundationers and non-foundationers alike. Both buildings were in the occupation of the governing body of the school. A number of the non-foundationers resided in certain masters' boarding-houses in the school precincts, which houses were in the occupation of the respective house-masters by whom they were kept:—

Held that, for the purposes of the assessment to house duty of the building in which the foundationers resided, the school room and class rooms ought not to be included in the valuation, as they "belonged to," in the sense of being used for the purposes of, the masters' boarding-houses as well as the building to be assessed.

Case stated by Commissioners of Income Tax.

At a meeting of the Commissioners for General Purposes of the Income Tax and Inhabited House Duty for the division of St. Margaret and St. John in the county of Middlesex the Governing Body of Westminster School appealed against the assessment to inhabited house duty on them for the years 1906–7 and 1907–8 respectively of 1041*l.* on the following school buildings valued as under:—

A.	Sanatorium	£98
B.	Ashburnham House, class rooms, &c. . .	425
C.	College building	200
D.	School	300
E.	Bursar's office	18
		£1041

and claimed that the whole of the buildings (other than E, the bursar's office, which it was admitted was liable to assessment with the headmaster's house) should be exempted as a "charity school" within the meaning of the House Tax Acts, or, alternatively, that the assessment should be restricted to 298*l.*, the aggregate annual value of A, the sanatorium, and C, the college building, as having no internal communication with the rest of the buildings B and D.

The following facts were proved or admitted:—

Westminster School was originally (i.e., immediately after the Reformation) a part of the College of St. Peter, Westminster. The foundation as ultimately constituted by Queen Elizabeth in 1560 consisted of a dean and chapter, many other officials, and also a headmaster, usher, and forty scholars. The dean and chapter were the governing body of the school. The "dorter" of the old monastery was assigned as the school room, and houses were assigned to the headmaster and usher. Town boys, that is, boys who were not "scholars," were allowed by the original statutes to attend the school. The scholars were called King's scholars or Queen's scholars according as a King or Queen happened to be on the throne. The foundation remained as above described until the passing of the Public Schools Act, 1868 (31 & 32 Vict. c. 118). Under that Act a new governing body was created for Westminster School, certain buildings (including those which are the subject of the present appeal) were vested in them (1), and an income of 3500*l.* payable by the Ecclesiastical Commissioners was assigned to the foundation. There are at present 270 boys in the school, sixty of these being foundation or King's scholars, of whom forty live in college, the building hereinbefore designated as C, and twenty are at liberty to reside at home or in one of the boarding-houses hereinafter

(1) By the Public Schools Act, 1868, s. 20, sub-s. 6, "From and after the passing of this Act there shall vest in the Governing Body for the time being of Westminster School for the use of the school . . . . the dormitory with its appurtenances, the school and class rooms, the houses and premises of the headmaster and undermaster, the three boarding-houses, and the gymnasium excepting the crypts."

Sub-s. 7: "All the said buildings shall be held by the said Governing Body for the use of the school."

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mentioned which form part of the school buildings. Each of the resident King's scholars pays the annual sum of 30*l.*, and subject to such payment he is educated and maintained during term time out of the income of the school. The twenty non-resident King's scholars pay nothing, unless any of them reside in one of the said boarding-houses, when a charge of fifty guineas yearly is made, or eighteen guineas as half-boarders, that is to say, if they only dine there. The remaining 210 boys not on the foundation pay thirty guineas for tuition. Those of them who board in one of the said boarding-houses pay in addition sixty-five guineas yearly, or twenty-four guineas in the case of half-boarders. The whole of the 270 boys use the class rooms, lavatories, gymnasium, carpenter's shop, fives courts, library, &c., and are taught in common.

The school buildings, the assessment of which was disputed, are situate on the east and north sides of Little Deans Yard; the block of buildings consisting of the sanatorium (hereinafter referred to as A) and college (hereinafter referred to as C) occupies the southern portion of the east side of the yard, and the block of buildings consisting of the class rooms, carpenter's shop, &c. (hereinafter referred to as B), and the large school room known as "Up School" (hereinafter referred to as D) occupies the northern portion of the east side and the whole of the north side of the yard. Little Deans Yard is not the property of the governing body of the school, but is vested in the Dean and Chapter of Westminster; it is one of the means of approach to the cloisters and the canons' houses therein, as well as being the usual approach to the school buildings; it is not a public thoroughfare, but is private property, and with Deans Yard is closed once a year. There is no internal communication between the block of buildings A and C on the one hand and the block B and D on the other. C is the college building proper, and A consists of the sanatorium, matron's quarters, and kitchen. C is a two-storeyed building, the dormitory being on the first floor, with accommodation for forty King's scholars who sleep there, and on the ground floor are studies for the boys, a prayer room, lumber room, and lavatories. The part of A known as the sanatorium consists of nine rooms

which are on the second and third floors. On the first floor of A are the matron's quarters (consisting of three rooms), linen room and cupboards, and there is a kitchen on the ground floor. No tuition is given in any part of A or C. There is complete internal communication throughout the whole of A and C respectively, and C communicates internally with A, but the two portions are architecturally distinct, the college building having been erected about the year 1720, and the main part of A having been built about the year 1847, and the upper storey having been added in the year 1902. The only means of getting from A and C to B and D is by crossing a portion of Little Deans Yard. Between the different portions of the block B and D there is internal communication throughout. D is now used only for prayers and for general assemblies of the boys. B in addition to the class rooms contains the school library, book offices, tuck shop, and common rooms with lockers for the boys' use, and a carpenter's shop with lavatories behind. The part of the building A which is used as a sanatorium is in fact used only for the King's scholars, but by one of the regulations made by the Special Commissioners under the Public Schools Act, 1868, the sanatorium is available at the discretion of the headmaster to receive cases of infection from the boarding-houses. Certain day boys, not being King's scholars, who have dinner at the school, dine with the King's scholars at the college hall which is not one of the buildings the subject of this appeal. The boarding-houses above referred to are two in number and are situate on the south side of Little Deans Yard. They are in the occupation of the house-masters who keep them respectively, and not of the governing body. From the abstract of accounts appended to the case it appeared that on the average of the two years 1907 and 1908 the total annual expenditure of the school was 14,901*l.*, and the total annual income inclusive of the endowment moneys received from the Ecclesiastical Commissioners was 16,262*l.* Of this latter sum 10,678*l.* was paid by parents of the boys in the school.

On behalf of the governing body it was contended that the buildings B and D are not liable to inhabited house duty on the ground that they are not inhabited, are not connected with any

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inhabited house, and are not used for profit; and that the buildings A and C being exclusively used by the King's scholars are a "charity school" within the meaning of case 4 of the Exemptions in Sched. B of the House Tax Act, 1808 (1), and as such are exempt from inhabited house duty.

On behalf of the Crown it was contended that the whole of the premises in question A, C, B, and D constituted one subject-matter of assessment, and that if regarded as a whole they could not be held to be a charity school within the exemption.

The Commissioners were of opinion that the school was a "charity school" within the meaning of the House Tax Acts and allowed the appeal. They were further of opinion that if the school was not a charity school the portions B and D ought to be excluded from the assessment.

Sir John Simon, *S.-G.*, and *Finlay*, for the appellant. This school is not a charity school. It must be looked at as a whole. The King's scholars and non-foundationers together constitute one school with a common organization. There is nothing to distinguish it from any other endowed school, and it could not be said that every school which has endowments is a charity school. No doubt for the purposes of income tax the expression "charity" is not confined to relief of poverty: *Commissioners of Income Tax* v. *Pemsel*. (2) Education is a charitable purpose within the meaning of the Income Tax Act, 1842,—*Commissioners for Special Purposes* v. *University College of North Wales* (3)—and consequently it is not disputed that the governing body would be entitled to exemption from income tax in respect of the money that they receive from the Ecclesiastical Commissioners so far as they apply it to the charitable purpose of education. But that is a very different thing from saying that the school is a charity school. Whether Westminster School was ever at any time a charity school is doubtful, for it appears that from the outset town boys were allowed to attend the school; but

(1) By case 4 of the Exemptions in Sched. B of the House Tax Act, 1808, there are exempted from house duty "Any hospital, charity school, or house provided for the reception or relief of poor persons."

(2) [1891] A. C. 531.

(3) (1909) 5 Tax Cases, 408.

however that may be it is not a charity school now, and the liability to taxation must be determined by reference to the status of the school at the time of assessment: *Charterhouse School* v. *Lamarque*. (1) The practical test is whether by far the larger portion of the school could not be carried on without the aid derived from the charitable foundation. "A school which is nearly self-supporting but has some assistance from endowments is not a charity school": per Phillimore J., *Bradford Grammar School* v. *Northwood*. (2) A hospital is not the less entitled to exemption because a rich person takes advantage of its existence and pays for services rendered in it, and conversely a nursing home would not be exempt as a hospital because it had one or two charity beds. Here the average annual cost of carrying on the school for the years 1907 and 1908 was about 14,900*l*., of which between 10,000*l*. and 11,000*l*. was paid by the parents of the boys.

Secondly, the buildings B and D ought to be included in the valuation as being "offices . . . . belonging to and occupied with" the dwelling-house A and C within the meaning of r. 2 of Sched. B to the House Tax Act, 1808. (3) In *Browne* v. *Furtado* (4), where a schoolmaster occupied a dwelling-house for the purposes of a private boarding school and also occupied in connection therewith certain adjacent buildings used as a chapel, gymnasium, class rooms, fives courts, and for other similar school purposes, it was held that the adjacent buildings must be included in the valuation of the dwelling-house. In *Clifton College* v. *Tompson* (5) similar school buildings were held not to be properly included in the valuation of the headmaster's dwelling-house. But there the buildings and the dwelling-house were in different occupations, the latter being occupied by the headmaster and the former by the company to whom the school belonged.

(1) (1890) 25 Q. B. D. 121.

(2) (1905) 5 Tax Cases, 124.

(3) Inhabited house duty is now imposed by the House Tax Act, 1851 (14 & 15 Vict. c. 36), and by s. 2 the rules of Sched. B of the House Tax Act, 1808, are incorporated. By r. 2 of those rules, "Every coach house, stable, brewhouse, wash house, laundry, woodhouse, bake-house, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling-house, shall in charging the said duties be valued together with such dwelling-house."

(4) [1903] 1 K. B. 723.

(5) [1896] 1 Q. B. 432.

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Here, as in *Browne* v. *Furtado* (1), they are in the same occupation. That case covers the present. In order that buildings not in themselves dwelling-houses may be included in the valuation it is not necessary that there should be any internal communication between them and the dwelling-house. That the test is not internal communication is clear from the fact that the appurtenances mentioned in r. 2 include yards and gardens. It is enough that the buildings are adjacent and are used along with and for the same purpose as the dwelling-house.

Ryde, K.C., and *Konstam*, for the defendants. The Commissioners were right on both points. First, this is a charity school. The word "school" has two meanings, that of an educational institution, and that of a building in which education is carried on. It is in the latter sense that the term "charity school" is used in case 4 of the exemptions. The words are "Any hospital, charity school, or house provided for the reception or relief of poor persons." The case of *Jepson* v. *Gribble* (2), in which the question was whether the residence of the medical superintendent of a lunatic asylum which was detached from the main buildings was within the exemption, shews that the word "hospital" refers not to the hospital authorities but to the hospital building, for otherwise there would have been no room for argument. The context in which the term "charity school" is found shews it means the building and not the institution. Here the building A and C is within the exemption. A school building which is kept exclusively for the housing of boys who are provided with gratuitous or substantially gratuitous education is a charity school. This question did not arise in *Charterhouse School* v. *Lamarque* (3), for there, although the school had originally been a charity school, all the gratuitously educated scholars having been congregated in one building, after the removal of the school from London to Godalming they ceased to be so congregated, and were distributed among the various masters' houses, in which they bore but a small proportion to the non-foundation boys. Here the King's scholars are housed under one roof and pay only 30*l.* for similar board and education to that for which the

(1) [1903] 1 K. B. 723. (2) (1876) 1 Ex. D. 151.
(3) 25 Q. B. D. 121.

non-foundationers pay ninety-five guineas. To the extent of the difference their education is gratuitous. To constitute a school a charity school within the exemption it is not necessary that the education there given should be confined to the sons of poor parents. Charity in this context does not connote the relief of poverty. In *Southwell* v. *Holloway College* (1) Charles J., dealing with the exemption in case 4, said: "The words 'charity school' must, in my opinion, be interpreted, having regard to the preceding and succeeding words, as 'school primarily intended for the supply of gratuitous education.' If that condition is fulfilled, then the exemption will be available, even although the pupils who are educated contribute towards the expense of education." He said nothing about its being limited to poor pupils. A building where none but foundation scholars were educated would be none the less a charity school because all the scholars happened to be the sons of rich men.

Secondly, if A and C are not exempt as a charity school, the buildings B and D ought to be excluded from the valuation as they are not "belonging to" the dwelling-house A and C within the meaning of r. 2. It may be conceded that B and D are offices within the meaning of that rule, and that they are occupied with A and C. But the rule requires that the appurtenances, if they are to be included, should not only be occupied with the dwelling-house but also belong to it, that is to say, be used for the purposes of it. They must belong to it alone, to the exclusion of other dwelling-houses in the occupation of third parties. Here the school room and class rooms are not used for the purposes of the dwelling-house in which the King's scholars reside any more than for the purposes of the masters' houses in which the non-foundation boys reside, and the latter are not in the occupation of the governing body. In *Browne* v. *Furtado* (2) the buildings in question were used for the purposes of the boys in the master's house and no others. There was there only one occupation. Therefore that case has no application to the present.

Sir John Simon, S.-G., in reply. The building A and C cannot for the purposes of exemption from house tax be separated from the other school buildings. All the buildings together constitute

(1) [1895] 2 Q. B. 487. (2) [1903] 1 K. B. 723.

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but one subject-matter. But even if A and C can be looked at separately they are not a charity school, for they are not a school at all. A school is essentially a building in which teaching is done, and the only teaching here is done in B and D. With regard to the point under r. 2, as both sets of buildings are vested in and occupied by the governing body, and as A and C would, but for the existence of B and D, serve no educational purpose, B and D must be treated as prima facie being used for the purposes of A and C; and if so they none the less belong to A and C, because they are also used for the purposes of other houses in different occupations.

Cur. adv. vult.

Dec. 4. HORRIDGE J. read the following judgment:—By s. 2 of 14 & 15 Vict. c. 36 the provisions of 48 Geo. 3, c. 55, Sched. B (which had been repealed by 4 & 5 Will. 4, c. 19), are by reference re-enacted. By that schedule the duty is made payable upon all inhabited dwelling-houses, and the occupiers for the time being are chargeable, and rules are made for charging the duty. The schedule also contains a table of exemptions, and by one of these (case 4) any hospital, charity school, or house provided for the reception or relief of poor persons is exempted.

The first question raised before me was whether or not the properties A, B, C, and D, forming part of the buildings constituting Westminster School in respect of which the assessment in this case is made, are within the exemption of a charity school. The assessment is made in respect of the years 1906-7 and 1907-8. As appears from the case the only boarders in A and C were the King's scholars, and they paid for such board the sum of 30*l.* each, whereas the boys who were not King's scholars paid sixty-five guineas each for board in the masters' houses. The buildings B and D were used equally by the forty resident King's scholars and by the remaining 230 boys, including the twenty non-resident King's scholars. It was contended on behalf of the respondents that as the buildings A and C were entirely occupied by King's scholars who were boarded at a price of 30*l.* as compared with the sixty-five guineas paid by the boys who were not King's scholars, such buildings

A and C were in fact a charity school. I cannot accede to this view, as it seems to me that these buildings were in no sense of the term a school in themselves, and no tuition was in fact given upon the premises at all; and in order to arrive at whether or not the buildings A and C were a charity school one must in my view look at the character of the governing body and decide whether the school buildings as a whole were used for purposes which made them the buildings of a charity school or not. In order to ascertain whether the school was a charity school or not one must, I think, apply the test laid down in *Charterhouse School* v. *Lamarque* (1) and *Southwell* v. *Holloway College* (2), and summarized by Phillimore J. in *Governors of Bradford Grammar School* v. *Northwood* (3), where he says: "Now a school which is nearly self-supporting but has some assistance from endowments is not a charity school. A school which is almost entirely supported by endowments but gets some little assistance from fees paid by scholars is a charity school, and in the same way a hospital which is almost entirely charitable is exempt as a hospital although it has a few paying patients. Per contra if the hospital is almost entirely self-supporting it is not exempt because it has some residual endowment. The whole matter therefore is a question of degree." The income and expenditure of the school as a whole is set out in the case, and from it it appears that far the larger portion of the income is from sources other than endowment. The number of King's scholars entitled to preferential treatment is sixty out of 270. I cannot therefore on these facts hold, nor do I think it was really contended before me, that, if A and C were not in themselves a charity school, the character of the school was in any sense that of a charity school. In coming to this conclusion I have not forgotten that the original buildings under the Public Schools Act, 1868, were vested in the governing body, but these buildings as a whole at that time were used both for the King's scholars and the boys who were not King's scholars. I think therefore that the assessment of the buildings A and C was right, and that the respondents have not brought themselves within the exemption.

(1) 25 Q. B. D. 121. (2) [1895] 2 Q. B. 487.
(3) 5 Tax Cases, 124, at p. 136.

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Horridge J.

It was further argued before me that, assuming the buildings A and C to have been rightly assessed, the buildings B and D could not be included in the assessment, as they were not, within r. 2 of Sched. B of 48 Geo. 3, c. 55, "belonging to and occupied with any dwelling-house." The facts with regard to these buildings were that they were used for all the 270 Westminster boys as class rooms, and for the other purposes indicated by the respective names of the buildings. It seems to me that these rooms were "occupied with" A and C, and this fact was not disputed on behalf of the respondents, but it was said that they were not "belonging to" the premises A and C. There are as appears by the plan masters' houses numbered 1 and 2, and the boys from these houses together with the others, making a total of 230, all use these buildings as well as the forty King's scholars from A and C. No authority, in my view, bearing on the point was cited to me, and on the best consideration I can give to the facts I cannot see why these buildings should belong to A and C any more than to either of the houses, and I am of opinion that they cannot in any sense be said to belong to A and C. I do not think that it makes them belong because for the purposes of getting inhabited house duty A and C are the only buildings which can be said to be occupied with them, for the occupation of the masters' houses is, for the purposes of inhabited house duty, the occupation of the masters and not of the governing body. It makes them occupied with A and C, but does not make them belong to the buildings A and C. In my view the appeal succeeds with regard to the buildings A and C, and fails as regards the buildings B and D.

Judgment accordingly.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondents: *H. B. Willett.*

J. F. C.

ATTORNEY-GENERAL *v.* CORPORATION OF THE CITY OF LONDON AND OTHERS.

1912
Dec. 4, 5, 6.

Revenue—Duty on Annual Income of Property belonging to or vested in Bodies Corporate and Unincorporate—Trustees to or in whom Property belongs or is vested—"Permanent Trusts"—Property not liable to Legacy or Succession Duty—Fund for Redemption of Debenture Stock issued by Corporation—Liability of Income of Fund to Duty—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *ss.* 11, 12.

By s. 11 of the Customs and Inland Revenue Act, 1885, it is enacted that "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue . . . . there shall be levied . . . . in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending the fifth day of April one thousand eight hundred and eighty-five, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period . . . ."

By s. 12 the term "body unincorporate" includes "every . . . : trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty."

By the Statute Law Revision Act, 1898, the recital in s. 11 of the Act of 1885 was repealed.

In June, 1897, the Corporation of the City of London for the purpose of paying off a debenture debt, and of raising further moneys, created an issue of debenture stock. In connection with the issue an indenture was entered into on June 24, 1897, between the Corporation and certain officials of the City of London who (including their successors in office) were described as "the trustees."

By the indenture the Corporation charged in favour of the trustees in trust for the stockholders all rents and income derived from their freehold and leasehold estates, and also other income of the Corporation, with the payment of all moneys for the time being owing on the security of the indenture. It was also provided that for better securing and providing for the redemption of the stock the Corporation should out of their annual income, after providing for the annual interest on the stock, set aside on January 1 and July 1 in every year, so long as any of the stock should remain unredeemed, the half-yearly sums of 7500*l.*, and should invest all such half-yearly sums and the resulting income thereof from time to time; and that the fund so created should be applied by the Corporation towards the redemption of the stock, after it should

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have become redeemable. Certain powers were conferred upon the trustees in case of default by the Corporation of the performance of their obligations under the indenture. Since the date of the deed the half-yearly sums of 7500*l.* had been regularly invested in the purchase of stock in the names of the trustees. The dividends and interest from the investments were as they arose applied by the Bank of England in the purchase of similar stocks. The purchases and investments were made with the consent of the Corporation and at the request of the trustees:—

Held, that the language in the recital to s. 11 must be read in contra-distinction to the language in the enacting part of the section, which did not refer, as the recital did, to "certain property which escapes liability to probate, legacy, or succession duties," but included "all real and personal property belonging to or vested in the Corporation during any of the yearly periods."

Held, further, that under the deed the holders of the debenture stock had no rights against or interest in the fund or its income which respectively belonged and accrued to the Corporation, provided they performed their obligations under the indenture, until the redemption period arrived when the debenture stock holders were entitled to be paid out of the fund.

Held, further (upon the assumption that the view that the fund belonged to the Corporation was wrong), that the trustees held the fund "upon such permanent trusts" that the same was not liable to legacy or succession duty within the meaning of s. 12 of the Act, inasmuch as the words "such permanent trusts" meant trusts of a sufficiently permanent character to prevent property being liable to legacy or succession duty on the death of individuals, and the fund in the hands of the trustees was not liable to those duties. The duty imposed by s. 11 was therefore chargeable upon the income of the fund.

WRIT of subpœna whereby the informant, the Attorney-General, claimed from the defendants the sum of 75*l.* 19*s.* in respect of corporation duty for the year 1909-10 based on income for the yearly period January 1 to December 31, 1908, that period being accepted by the Commissioners of Inland Revenue for the convenience of the defendants in lieu of the statutory yearly period April 6, 1908, to April 5, 1909. The parties concurred in stating the questions of law arising in the following case for the opinion of the Court. The defendants the Mayor and Commonalty and citizens of the City of London are referred to as "the Corporation," and the other defendants were the Lord Mayor of London, the Governor of the Bank of England, and the Chamberlain of the City of London.

By s. 11 and following sections of the Customs and Inland

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Revenue Act, 1885 (1), a duty known as corporation duty (subject to certain exemptions) is to be levied at the rate of 5*l.* per cent. upon the annual value, income, or profits of all real and personal property belonging to or vested in any body corporate or unincorporate.

By an indenture dated June 24, 1897, and made between the Corporation of the one part and the then Lord Mayor of London, the Governor of the Bank of England, and the then Chamberlain of the City of London of the other part, it was recited among other things that the Corporation had determined to create from time to time debenture stock to be constituted and secured in the manner thereinafter appearing, and had agreed with the Governor and Company of the Bank of England with reference to the issue and transfer of such stock and the payment of the interest thereon and the management thereof.

The indenture contained provisions for the issue and limits of the stock, for the payment of interest at the rate of 2½ per cent.

(1) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted, that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the fifth day of April one thousand eight hundred and eighty-five, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property . . . ."

Sect. 12: "In the construction and for the purposes of this part of this Act—

"The term 'body unincorporate' includes every unincorporated company, fellowship, society, association, and trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty."

By the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), the preamble to s. 11 of the Customs and Inland Revenue Act, 1885, was repealed; but the repealed portion of the section is set out in order that the reference to it in the arguments and judgment may be conveniently followed.

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per annum, and for the creation of a charge in favour of the trustees (who were to be the Lord Mayor, the Governor of the Bank of England, and the Chamberlain for the time being) in trust for the stockholders on all rents and income derived from the freehold and leasehold estates of the Corporation, and also other incomes of the Corporation.

By clause 1 it was provided (inter alia) that "'The stockholders' means as regards stock not represented by certificates to bearer the several persons for the time being registered in the register of stockholders to be kept by the Bank as provided in the second schedule hereto as holders of the stock and as regards stock represented by certificates to bearer the bearers for the time being of such certificates.

"'The Bank' means the Governor and Company of the Bank of England."

Clause 2. "As and when the stock or any part thereof ought to be redeemed in accordance with the conditions set forth in the second schedule hereto the Corporation shall pay to the stockholders or their representatives the full amount of the stock held by them respectively and such payment shall operate in satisfaction of the stock so redeemed and in the meantime until the stock is redeemed the Corporation shall pay to the stockholders or their representatives interest on the stock held by them respectively at the rate of two pounds ten shillings per centum per annum by half-yearly payments on every first day of January and first day of July."

Clause 3. "The stock shall be issued and held subject to the conditions set forth in the second schedule hereto and such conditions shall be binding on the Corporation and the stockholders and their representatives and all persons claiming through them respectively."

Clause 4. "The total amount of the stock to be created as aforesaid shall not exceed 4,000,000*l.* (four million poundssterling) save and except that such sum may be exceeded if the Corporation shall think fit for the purpose of raising money to be laid out by them in the purchase of freehold or leasehold messuages buildings lands or other hereditaments or in the erection construction or improvement of any messuages buildings works or other things of a permanent nature upon any lands for the time being

belonging to the Corporation Provided always that no person taking any of the stock shall be concerned to inquire as to the purpose for which it is created or to see to the application of the moneys raised by the issue thereof."

Clause 5. "The Corporation hereby charge in favour of the trustees in trust for the stockholders all the rents and income derived from the freehold and leasehold estates and all the tolls dues stallages rents and revenues of or to which the Corporation now are or at any time or times hereafter shall become seised possessed or entitled otherwise than as trustees or mortgagees with the payment of all moneys for the time being owing on the security of these presents."

Clause 7. "For better securing and providing for the redemption of the stock in accordance with the conditions set forth in the second schedule hereto the Corporation shall create a fund as hereinafter mentioned that is to say the Corporation shall out of their annual income after providing for the annual interest on the stock set aside on the first day of January and the first day of July in every year so long as any of the stock shall remain unredeemed the half-yearly sums of seven thousand five hundred pounds and shall invest all such half-yearly sums in or upon investments authorized by law for the investment of trust funds or in or upon such other investments as the Corporation shall think fit with full power to vary such investments and shall accumulate the income of such investments by similarly investing the same and the resulting income thereof from time to time and the said fund so created shall be applied by the Corporation in or towards the redemption of the stock after the same shall have become redeemable under the conditions set forth in the second schedule hereto."

Clause 8. "The security hereby constituted shall become enforceable in either of the following events and in no other event that is to say :—

"(1.) If the Corporation shall make default in the payment of any principal moneys or interest which ought to be paid in accordance with these presents and the trustees shall after such default and before the payment of such principal moneys or interest be requested by extraordinary resolution of the stockholders to enforce the security hereby constituted and the

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Corporation shall for twenty-eight days after receiving notice of such resolution fail to make such payment or

"(2.) If the Corporation shall make any other default in the performance of any of the covenants or obligations herein contained and shall for twenty-eight days after being required in writing by the trustees to remedy or make good the same fail to comply with such requisition and the trustees shall after such failure be requested by an extraordinary resolution of the stockholders to enforce the security hereby constituted and the Corporation shall for twenty-eight days after receiving notice of such resolution still fail to comply with such requisition."

Clause 10. "At any time after the security hereby constituted shall become enforceable the trustees may apply to the High Court of Justice for an order that the trusts hereof be carried into execution under the direction of the Court and for the appointment of a receiver or receivers of the said premises hereinbefore charged or any part or parts thereof or subject to the proviso next herein contained for any other order in relation to the administration of the trusts hereof or the enforcement of the security hereby made as the trustees shall deem expedient and the trustees shall be indemnified by the Corporation against all the costs and expenses incurred by or in relation to any such application or proceedings Provided always that the trustees shall have no power to sell and neither the trustees nor the stockholders shall be entitled to apply to the Court for or compel any sale of the said premises hereinbefore charged or any of them."

Clause 31. "The Corporation hereby covenant with the trustees that the Corporation will duly perform and observe all the obligations imposed on the Corporation by these presents."

Clause 32. "It shall not be incumbent on the trustees to give notice to any person or persons of the execution of these presents or to see to the performance or observance by the Corporation of any of the covenants or obligations herein contained or in any way to interfere with or supervise the acts or conduct of the Corporation unless and until the security hereby constituted shall become enforceable and the trustees shall not be deemed to commit a breach of trust or incur any liability whatsoever by neglecting or omitting so to do."

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"THE SECOND SCHEDULE HEREINBEFORE REFERRED TO.

"Conditions as to Issue of Debenture Stock.

"The following are the conditions upon which the debenture stock is to be issued.

"1. The Corporation may give to the stockholders or their representatives not less than six calendar months' notice of the intention of the Corporation to redeem the stock at par on the first day of July 1927 and if such notice shall be given the stock will be redeemed accordingly. The stock if not previously redeemed will be redeemed at par on the first day of July 1957 or as soon as the security hereby constituted shall become enforceable and as and when the stock ought to be redeemed in accordance with these presents the Corporation will subject to these conditions pay to the stockholders or their representatives the redemption moneys for the same. Such payments will be made at the Bank of England . . . . and as from the time fixed by any such notice for the redemption of the stock it shall cease to carry interest.

. . . . .

"18. Subject to the conditions hereinafter mentioned every person registered in the register of stockholders as entitled to any stock may obtain from the Bank a certificate or certificates of title to his stock or to part thereof transferable by delivery and with coupons annexed entitling the bearer of the coupons to the interest payable in respect of that stock or part of stock . . . ."

. . . . .

On June 28, 1897, the defendants the Corporation issued a prospectus inviting tenders for an issue of 1,250,000*l.* of the debenture stock. The prospectus (so far as material) was as follows :—

"Corporation of London £2½ per cent. Debenture Stock.

"Interest payable half-yearly, 1st January and 1st July, at the Bank of England.

"First Issue of £1,250,000, part of £4,000,000.

"Minimum price of Issue £101 per cent.

"Issued under the authority of the Corporation of London, on the security of the Trust Deed constituting and securing the Debenture Stock.

"Trustees for Debenture Stockholders :

"The Right Honourable the Lord Mayor.

"The Governor of the Bank of England.

"The Chamberlain of London.

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"The Corporation of London give notice that they will be prepared to receive on the sixth day of July, 1897, at the Bank of England, sealed tenders for £1,250,000 of Corporation of London 2½ per cent. Debenture Stock. The money is required for providing for the discharge of a portion of the bonded debt of the Corporation and converting the same into debenture stock. The stock is secured by, and is to be held subject to the conditions of, a trust deed . . . . charging all the rents and income derived from the freehold and leasehold estates, and all the tolls, dues, stallages, rents and revenues of or to which the Corporation now are or at any time hereafter shall become entitled, otherwise than as trustees or mortgagees. For further securing and providing for the redemption of the stock the Corporation covenant to set aside £15,000 per annum out of their annual income after providing for the annual interest on the stock, and to invest and accumulate such annual sums and the income thereof."

Under and upon the terms stated in the indenture and prospectus the defendants the Corporation from time to time made issues of the debenture stock.

By an indenture dated June 1, 1905, and made between the Corporation of the one part and the then Lord Mayor, the then Governor of the Bank of England, and the Chamberlain of the City of London of the other part, reciting that under the lastly stated indenture the Corporation had from time to time issued stock amounting to 1,642,900*l.* carrying interest at the rate of 2½ per cent. per annum, and that the Corporation were desirous of issuing further parts of the stock intended to be secured by the indenture, but that owing to the state of the money market it might be necessary to pay a higher rate or higher rates of interest than 2½ per cent. on the stock which should be so issued, it was declared that such stock might be issued at a higher rate or higher rates of interest than 2½ per cent. The Corporation had accordingly issued certain debenture stock carrying interest at the rate of 3 per cent. per annum.

The Corporation had since the date of the indenture of June 24, 1897, regularly in January and July in each year carried to the debenture stock sinking fund for the debenture stock

holders the half-yearly sums of 7500*l.*, which sums had been regularly invested in the purchase of stock for and in the names of the trustees for the debenture stock holders, and the dividends and interest from those investments were as they arose applied by the Bank of England in the purchase for and in the names of the trustees for the debenture stock holders of similar stocks. On these purchases being effected a stock receipt was obtained by the Chamberlain on behalf of the trustees, and the Court found as a fact that the purchases were made with the consent of the Corporation and at the request of the trustees. The following is a specimen of the stock receipts :—

"Cr. 1872 . . . . . £653 10*s.* 10*d.*
"India £2 10*s.* 0*d.* per cent Stock.
"Redeemable 5th October, 1926. Bot. @ 69⅜.

"Received this 11th day of April, 1910, of the Lord Mayor of London, the Governor of the Bank of England, the Chamberlain of London, all for the time being hereinafter called the said transferee, the sum of four hundred and fifty-three pounds 7*s.* 11*d.* being the consideration for six hundred and fifty-three pounds ten shillings and tenpence interest or share in the capital £2 10*s.* 0*d.* per cent. stock created under Act of Parliament enabling the Secretary of State in Council of India to raise money in the United Kingdom for the service of the Government of India, transferable at the Bank of England, and all my property and interest in and right to the same, and the dividends thereon by me this day transferred to the said transferee . . .

Mullens Marshall & Co. Stamp 1s.

	£	*s.*	*d.*
	453	7	11
"Stamp . . .	0	1	0
"Commission divisible with the Bank .	0	16	4
	£454	5	3

"Witness my hand,
"J. W.
"Attorney to
"Witness
"R. Youlton. "W. V. Heale. A. H. M. Praed."

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The defendants contended that by so acting they were acting under and in order to carry out the provisions of the indenture of June 24, 1897, and in discharge of their liabilities and responsibilities under clause 7 thereof, but this contention was not admitted by the Attorney-General.

The trustees were specially named and appointed under and for the purposes of the indenture of June 24, 1897, and it was contended by the defendants—but this contention was not admitted by the Attorney-General—that the trustees held the stocks as trustees for the debenture stock holders for the purposes of the sinking fund provided for by the indenture of June 24, 1897, and that none of the stocks nor the income arising therefrom nor any part thereof could be dealt with or transferred except by the trustees. According to the custom and practice of the Corporation the trustees for the Corporation were the Chamberlain, the Town Clerk, and the Comptroller of the Chamber of the City of London for the time being, and the sums of money belonging to the Corporation in its corporate capacity were invested in their names and the dividends arising from those investments were received by them as directed by the committee of the Corporation having the control of the funds.

It was admitted by the parties that a decision as to income from any one of the investments would govern the whole income of the sinking fund, and for simplicity and convenience this case was limited to one particular investment, namely, India 2½ per cent. Stock.

The details as to the sinking fund investments so far as the particular investment to which this case relates were as follows:—On January 1, 1908, there was in the sinking fund 61,665*l.* 14*s.* 8*d.* India 2½ per cent. Stock; on December 31, 1908, there was 63,624*l.* 19*s.* 5*d.* of this India 2½ per cent. Stock. The income arising during the year from this India Stock amounted to 1519*l.* 1*s.* 3*d.* The duty on this 1519*l.* 1*s.* 3*d.* at the rate of 5 per cent., namely, 75*l.* 19*s.*, was the sum now claimed by the Attorney-General.

No part of the debenture stock created under the indentures had been redeemed, and the sinking fund held by the trustees

would not be sufficient to redeem the debenture stock which had been created and was outstanding.

The Corporation had duly rendered an account for the purpose of corporation duty of their general income chargeable with corporation duty for the yearly period January 1 to December 31, 1908, and had paid duty on such income. It was admitted that in the account the income derived from the 2½ per cent. India Stock was not included.

On behalf of the Attorney-General it was contended:

(1.) That the income of the 2½ per cent. India Stock hereinbefore referred to was liable to corporation duty under and by virtue of s. 11 of the Customs and Inland Revenue Act, 1885.

(2.) That the stock, although standing in the name of the trustees, belonged to and was in point of law vested in the Corporation.

(3.) That in the alternative the stock was vested in the trustees.

(4.) That in either event the income of the stock falling within the general charge was not within any of the exemptions contained in s. 11.

(5.) That the sum claimed was due and payable by the Corporation or in the alternative by the trustees to the Crown.

On behalf of the defendants it was contended:

(1.) That no part of the income of the 2½ per cent. India Stock was liable to corporation duty.

(2.) That no part of the 2½ per cent. India Stock or the income thereof belonged to or was vested in the Corporation.

(3.) That upon the facts stated in the case the 2½ per cent. India Stock and the income thereof belonged to and were vested in the trustees for the debenture stock holders and for their benefit.

(4.) That no part of the 2½ per cent. India Stock or the income thereof belonged to or was vested in the trustees in such manner as to render the same or any part thereof chargeable to corporation duty.

(5.) That no part of the sum claimed was due or payable by the defendants or by either of them to the Crown.

The question for the opinion of the Court was whether

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corporation duty was chargeable upon the income of the 2½ per cent. India Stock. If the Court should be of opinion in the affirmative on this question, judgment was to be entered for the Attorney-General for the sum claimed with costs, including the costs of this case and the determination thereof.

If the Court should be of opinion in the negative on this question, judgment was to be entered for the defendants with costs, including the costs of this case and the determination thereof.

Sir J. A. Simon, S.-G., Austen-Cartmell, and *W. Finlay,* for the informant. The true view of the effect of this deed is that the stock in question was property both "belonging to" and "vested in" the Corporation within the meaning of s. 11 of the Customs and Inland Revenue Act, 1885, or was either the one or the other. In either case the income of this stock is liable to the duty imposed by s. 11, and it is not suggested that any of the exemptions stated at the end of that section apply.

In the alternative, if the true view is that this stock belongs to and is vested in the trustees, the trustees are a "body unincorporate" within the definition contained in s. 12 of the Act, and the income of the stock is equally liable to duty under s. 11: *In re Duty on Estate of New University Club.* (1)

By this deed the Corporation only covenants to set aside a certain annual sum and to earmark it as a fund for the redemption of debentures; there is no covenant to pay the money to the trustees or to invest it in their names. The fund, therefore, belongs to the Corporation, and it can make no difference that the Corporation has in fact invested it in the names of the trustees.

The word "vest" is generally used with reference to the legal ownership of property; the word "belongs" is generally used in reference to the beneficial ownership. As a matter of convenience the Corporation makes use of the trustees for the purpose of dealing with the fund, but it belongs to the Corporation, although the debenture-holders have a contingent interest in it. A definition of the term "vest" which will include every case cannot be given, but it must be construed in s. 11 of the Customs and Inland Revenue Act, 1885, having regard to the subject-

(1) (1887) 18 Q. B. D. 720.

matter of the present case. Some light is thrown upon the meaning of the word "vest" as ordinarily used by the judgment of the Court of Appeal (delivered by Lindley L.J.) in *In re Brown* (*a Lunatic*) (1), and by the judgment in *Coverdale* v. *Charlton* (2), and s. 12 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), contains a provision for the vesting of trust property in new or continuing trustees.

Danckwerts, *K.C.*, and *A. M. Bremner*, for the defendants. The decision in *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3), shews that the word "vest" may be used equally in connection with a bare estate for the time being in property as in connection with a legal estate or an equitable interest in property. The judgment of Lord Halsbury L.C. in *Tennant* v. *Smith* (4) shews that in order to impose a tax upon the subject the words of the statute must be clear, and the same proposition is enunciated by Lord Cairns in *Partington* v. *Attorney-General* (5) and Lord Herschell in *Colquhoun* v. *Brooks*. (6)

The preamble to s. 11 of the Customs and Inland Revenue Act, 1885, shews that the mischief aimed at by the section was to prevent property which would be liable to probate, legacy, or succession duty if it were not vested in a corporation escaping the duty by being so vested, and in order to accomplish this the corporation duty was imposed on that kind of property. But neither probate, legacy, nor succession duty was ever payable on the property of trustees if one of the trustees died. If, however, a beneficiary dies death duties become payable. In the present case the beneficial interest is vested in the debenture stock holders, and if a stockholder dies death duties become payable. An amount of stock represents a corresponding amount of indebtedness of the Corporation, and of this debt each stockholder owns an aliquot part. If any stockholder transfers his stock the transferee acquires the rights of the transferor. Every stockholder in the present case has a floating charge on the property of the Corporation, and when the time for redemption

(1) [1895] 2 Ch. 666.
(2) (1878) 4 Q. B. D. 104.
(3) (1880) 14 Ch. D. 785.
(4) [1892] A. C. 150.
(5) (1869) L. R. 4 H. L. 100.
(6) (1889) 14 App. Cas. 493.

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arrives each stockholder will have the right to have his share of the fund applied in payment of the amount of his stock. Clause 7 of the deed of June 24, 1897, provides that the fund shall in any event be applied to that purpose; and any transferee, including the personal representative of a deceased stockholder, will succeed to the rights of the stockholder. Each stockholder acquires what may be described as a bundle of rights. A Court of Equity could compel the fund to be invested in the names of trustees. The income of the fund as well as the fund itself belongs to the stockholders and each successor pays death duties.

As to s. 12 of the Customs and Inland Revenue Act, 1885, the fund is vested in the trustees, but not "upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty." The trusts are not permanent within the meaning of s. 12 because when a stockholder dies legacy or succession duty would become payable. The trustees have nothing belonging to them in a beneficial sense. Although it is payable in futuro, the whole beneficial interest in the fund is in the stockholders. The fund is not merely a security to the stockholders. It is an actual sum payable to the stockholders. In *National Telephone Co.* v. *Inland Revenue Commissioners* (1) it was held that the word "security," which is used under the head "Bond, Covenant, or Instrument of any kind whatsoever" in the First Schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39), included an instrument creating a direct obligation to pay at a definite time, and it is in that sense that the word is used in clause 7 of the deed, i.e., in the sense of a sum in respect of which there is a direct obligation to pay to the stockholders.

Austen-Cartmell in reply. Clause 7 of the deed of June 24, 1897, assumes that the Corporation receives the income of the accumulating fund and that it will invest it from time to time. The operation contemplated by clause 7 can only be described as income accruing to the Corporation. The charging words in s. 11 of the Act of 1885 are absolutely wide and general. They charge the income of "all real and personal property"

(1) [1900] A. C. 1; [1899] 1 Q. B. 250.

belonging to or vested in the Corporation. The preamble to the section is repealed by the Statute Law Revision Act, 1898, and the result is that the absolute unlimited charge alone remains. In s. 12 the property charged is limited to property vested on "such permanent trusts, that the same shall not be liable to legacy duty or succession duty," but there is no limitation in s. 11. The judgments in *Powell* v. *Kempton Park Racecourse Co.* (1) shew that the recital in s. 11 of the Act, even if it must still be considered as material to the true construction of the section, cannot be read so as to limit the enacting words if the language is clear and unambiguous. "Certain property" is mentioned in the recital, but the operative part of the section includes all real and personal property. The word "accrued" in s. 11 means "has become due." Income "accrued" is income which has become due. If the income had not accrued to the Corporation they would not have been able to invest it. The ultimate destination of the money is immaterial. Apart from the deed of 1897 the Corporation has full control of the money, but by the contract contained in the deed the Corporation have limited their control. The fund belongs to or is vested in the Corporation until the moment of its application under the deed. The Court would not have ordered the fund to be invested in the names of the trustees, although it would, no doubt, prevent its misapplication. The only obligation upon the Corporation is to set aside the fund and invest it. Up to the moment of investment the fund is operated upon by the Corporation and is therefore within s. 11 as having belonged to or been vested in the Corporation. Sect. 14 of the Act of 1885, which enacts that "the duty hereby imposed shall be a first charge on all the property in respect whereof the same shall be payable . . . ." shews that it is not merely income that is charged with the duty. The word "accrued" is of wider signification than "paid." A body corporate or unincorporate may own land from which it derives no income. In that case the annual value of the land would be taken under s. 11 as having "accrued" although no actual payment had been made. The decision in *Mersey Docks and Harbour Board* v. *Lucas* (2) shews that for the

(1) [1899] A. C. 143. (2) (1883) 8 App. Cas. 891.

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purpose of considering whether the duty is chargeable the destination of the income is immaterial.

If the fund does not belong to or is not vested in the Corporation it belongs to or is vested in the trustees upon permanent trusts within the meaning of s. 12 of the Customs and Inland Revenue Act, 1885. The word "permanent" indicates a trust that will endure or last having regard to the subject-matter of the trust. A trust that is to last for one hundred years would be permanent within the meaning of the section. But whether the trust is to last for one year or one hundred years, it would be permanent within the meaning of the section if during that period death duties would not become payable. The word "permanent" does not of necessity mean "everlasting." The question is whether the trusts are sufficiently long to prevent death duties becoming payable. The word "such" in s. 12 qualifies "permanent" and must be read with it. It means that the trusts are so permanent that the death duties are not payable. Until the fund becomes actually payable to them the stockholders have no right to or share in it. On the death of a stockholder duty is paid on the market value of the stock, and there is no evidence that if the fund did not exist the value of the stock would be less. The duty is paid upon the debenture stock, not upon the fund.

Cur. adv. vult.

Dec. 6. The following judgment was read by

HORRIDGE J. The question in this case is whether the fund referred to, being on December 31, 1908, 63,624*l.* 19*s.* 5*d.* Two-and-a-Half per cent. India Stock, the income from which amounted to 1519*l.* 1*s.* 3*d.*, is liable to a duty of 5 per cent., amounting to 75*l.* 19*s.*, under the provisions of s. 11 of the Customs and Inland Revenue Act, 1885.

The circumstances in which the fund, of which this forms part, has been created are set out in the case, but they are shortly as follows. In June, 1897, the Mayor and citizens of the City of London, to whom I shall later refer as "the Corporation," were minded to pay off a certain debenture debt, and for that purpose, and to raise further moneys, to create an issue of

debenture stock. In connection with that issue an indenture was entered into on June 24, 1897, between the Corporation of the one part, and the then Lord Mayor of London, the Governor of the Bank of England, and the Chamberlain of the City of London of the other part, who were described as the trustees, in which term were included their successors in office respectively.

Clause 7 of that indenture is as follows: "For better securing and providing for the redemption of the stock in accordance with the conditions set forth in the second schedule hereto the Corporation shall create a fund as hereinafter mentioned that is to say the Corporation shall out of their annual income after providing for the annual interest on the stock set aside on the first day of January and the first day of July in every year so long as any of the stock shall remain unredeemed the half-yearly sums of 7500*l.* and shall invest all such half-yearly sums in or upon investments authorized by law for the investment of trust funds or in or upon such other investments as the Corporation shall think fit with full power to vary such investments and shall accumulate the income of such investments by similarly investing the same and the resulting income thereof from time to time and the fund so created shall be applied by the Corporation in and towards the redemption of the stock after the same shall have become redeemable under the conditions set forth in the second schedule hereto."

As appears by the case, since the date of the deed the half-yearly sums of 7500*l.* have been and are regularly invested in the purchase of stock in the names of the trustees. The dividends and interest from those investments are, as they arise, applied by the Bank of England in the purchase of similar stocks. Such purchases and investments, as appears by the stock receipts, are made on the request of the trustees. The India Two-and-a-Half per cent. Stock, amounting to 63,624*l.* 19*s.* 5*d.*, forms part of such investments.

I do not think that under clause 7 there was any obligation on the part of the Corporation to invest the moneys in the names of third parties; but as I find it was in fact done, I think I am right in drawing the inference that it must have been done with the consent of both the Corporation and the trustees. The

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position therefore is that, as regards this sum of money, the Corporation have the right to require the investment to be changed, and are bound to apply the sum in or towards the redemption of the debenture stock after the same shall have become redeemable. The trustees, on the other hand, have certain rights, under clause 8 of the indenture, of exercising certain powers in case of default by the Corporation. The holders of the debenture stock have, in my view, no rights against or interest in the fund, provided the Corporation perform their obligations under the indenture, until the redemption period arrives, when they are entitled to be paid out of the fund.

On behalf of the Corporation and the trustees, who are both respondents in the case, it was contended that s. 11 only applies to property belonging to or vested in the Corporation which would escape liability to probate, legacy, or succession duty within the recital; but in my view the language in the recital must be read in contradistinction to the language in the enacting section, which does not refer, as the recital does, to "certain property," but to "all real and personal property"; and the enacting part of it therefore, in my view, brings in all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period in question.

The case was presented on behalf of the Crown in two ways. First it was said that this fund was property belonging to or vested in the Corporation as a body corporate, and, secondly, that it was vested in the trustees as a body unincorporate within the definition in s. 12.

As regards the first point, I think that under the section not only must the property belong to or be vested in the Corporation, but the duty must be calculated upon the annual value, income, or profits accrued to such body corporate. In my view, in this case, although the Corporation were bound to apply the property under the indenture in a specific way, the property none the less still belonged to them; and although the income had also to be applied under the indenture in a specific way, the income no less accrued to them. The fact that the investment by arrangement stood in the names of the trustees, and that they received the money, does not, to my mind, prevent

the moneys belonging to the Corporation and the income accruing to the Corporation.

If I am wrong in this view, I still think the Crown are right in their second contention. The trustees, I think, hold the funds upon such permanent trusts that the same are not liable to legacy duty or succession duty. I read the words "such permanent trusts" to mean trusts of a sufficiently permanent character to prevent property being liable to legacy duty or succession duty on the death of individuals.

It was urged before me that the funds were liable to legacy duty or succession duty inasmuch as on the death of the holder of debenture stock legacy duty or succession duty would be payable on the value of the stock, and as one of the elements in the value of the stock consisted in the right to be redeemed out of this fund, this amounted to a liability of the property itself to legacy duty or succession duty.

I cannot take this view, as I do not think it amounted to a liability to legacy duty or succession duty on the fund in question. I think that this was a sufficiently permanent trust, and that the funds in the hands of the trustees, if they were vested in such trustees, as I think they were if they did not belong to the Corporation, were not liable to legacy duty or succession duty. No case cited to me really seems to me to be of any assistance, and I have therefore (upon what no doubt is a difficult question) to give the best judgment I can upon the statute from the consideration of the case stated and the documents referred to in it.

In answering the question for the opinion of the Court I hold that corporation duty is chargeable upon the income of the Two-and-a-Half per cent. India Stock, and judgment must be entered for the Attorney-General for the sum claimed. I do not think that the direction in the case as to costs is binding upon me; but whether it is or not, I think the judgment for the Attorney-General must be with costs.

Judgment for informant.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitor for defendants: *The City Solicitor.*

J. E. A.

1912
Dec. 6, 18.

COMMISSIONERS OF INLAND REVENUE *v.* GRIBBLE AND OTHERS.

Revenue—Reversion Duty — "Purchase" of Reversion—Marriage Settlement—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 14.

A reversion on a lease conveyed by a marriage settlement in consideration of marriage is not "purchased" within the meaning of s. 14, sub-s. 1, of the Finance (1909-10) Act, 1910, which in certain cases grants exemption from reversion duty in respect of a reversion "purchased" before April 30, 1909.

APPEAL of the Commissioners of Inland Revenue from the decision of a referee upon an appeal against an assessment to reversion duty.

The respondents were the freeholders of a house and together constituted "the lessor" for the purpose of s. 15 of the Finance (1909-10) Act, 1910, and the person to whom the benefit (if any) accrued from or by reason of the determination of the lease of the house for the purpose of reversion duty.

By a lease made in 1817 the house was demised by the predecessors of the respondents to a lessee for a term of ninety-four years from Michaelmas, 1816.

By a conveyance dated August 1, 1888, made upon the marriage of F. C. Coxhead and A. B. Gribble, the house was conveyed to trustees in fee simple, subject to the lease, upon trust that the trustees should sell the same and hold the proceeds of sale upon the trusts declared by another indenture of the same date. That other indenture was a settlement made upon the said marriage. It declared that the trustees, who were the same in both indentures, should hold the house and the proceeds of sale thereof and the rents and profits thereof until sale, upon trust to pay the annual income to the wife for life and after her death to the husband for life, and after the death of the survivor upon trust as to the capital for the issue of the marriage and in default of issue for such person or persons and purposes as the wife should by deed or will appoint, and in default of such appointment for the next of kin of the wife.

The respondents were on September 29, 1910, when the

lease of the house expired, the trustees of the conveyance and settlement of August, 1888, and the house was vested in them upon the above trusts.

The Commissioners of Inland Revenue made an assessment upon the trustees to reversion duty in respect of the benefit accruing to them by the determination of the lease of the house, under s. 13 of the Finance (1909-10) Act, 1910. The respondents appealed to a referee against the assessment upon the ground that no reversion duty was payable by reason of the provisions of s. 14, sub-s. 1, of the Act. (1)

The respondents contended before the referee that, in view of the fact that the conveyance and settlement of August, 1888, were made in consideration of marriage, the reversion had been "purchased," within the meaning of s. 14, sub-s. 1, of the Act, at a date within forty years of the determination of the lease, and that accordingly no reversion duty was payable. The referee decided that no reversion duty was payable, and the Commissioners appealed.

Sir John Simon, S.-G., and *Austen-Cartmell*, for the appellants. This reversion was not "purchased" within the meaning of s. 14, sub-s. 1, of the Act. In this section the word "purchased" means bought in the commercial sense for money or money's worth. The nouns "purchase" and "purchaser" are, it is true, frequently used in the strict technical sense to denote the acquisition of land by a title other than descent; but the verb "to purchase" is never used in that sense. There is no reason why reversion duty should not be charged where the title to a reversion has passed by a mere gift. Although marriage constitutes a valuable consideration it is not equivalent to money or money's worth.

(1) 10 Edw. 7, c. 8, s. 14, sub-s. 1: "Where, in the case of a reversion to a lease purchased before the thirtieth day of April nineteen hundred and nine, the lease on which the reversion is expectant determines within forty years of the date of the purchase, no reversion duty shall be charged under this Part of this Act on the determination of the lease: Provided that this exemption shall not apply where the lease is determined within forty years by agreement between the lessor and the lessee, whether express or implied, not contained in the lease itself, unless the lease would, apart from any such agreement, have determined within that period."

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This was a conveyance to the trustees upon trust for sale, and they are not within the marriage consideration. The beneficiaries take only an interest in the proceeds of sale and are not in any sense purchasers of the reversion.

Ryde, *K.C.*, and *Konstam*, for the respondents. As to the distinction attempted to be drawn between the nouns "purchase" and "purchaser" and the verb "to purchase," there are many instances in which the verb has been used with reference to cases other than commercial sales and purchases: see 27 Eliz. c. 4, preamble; *Douglas* v. *Waad* (1); *Watkins* v. *Steevens* (2); Dart, Vendors and Purchasers (5th ed.), p. 889; Litt., s. 12; Termes de la Ley (ed. 1641), p. 228; Williams on Real Property (ed. 1906), pp. 78, 221.

Until the trust for sale is carried out by the trustees, the beneficiaries have purchased and are entitled to the reversion itself.

Sect. 14, sub-s. 1, throughout uses technical terms and legal language, and it is most improbable that, in a section so full of legal and technical terms, a technical term such as "purchase" is not used in its legal and technical sense. There can be no difference in principle between a consideration given in money and the consideration of marriage. The narrow construction for which the Crown contends would exclude all purchasers for the consideration of marriage, which might often lead to grave injustice. If purchase in this section is restricted to purchase for money, the absurd result would follow that if property of equal value was given in exchange for a reversion the person so acquiring the reversion would not get the benefit of the exemption.

In this Act, s. 74, sub-s. 5, deals with voluntary dispositions and speaks of dispositions to a "purchaser," and recognizes that marriage is a valuable consideration: see also s. 3 of the Finance Act, 1894 (57 & 58 Vict. c. 30). In s. 7, sub-s. 1 (B), of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the Legislature, recognizing that a marriage settlement is a purchase for value, accordingly expressly provides that there "a purchase for value shall not be deemed to include a conveyance in consideration of

(1) (1667) Ch. Cas. Pt. I. 99.
(2) (1689) Nelson's Reports in Chancery, 160.

marriage"; and s. 17 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), shews that when the Legislature intends to restrict consideration to "money or money's worth" it expressly says so.

Austen-Cartmell in reply. In *Ex parte Hillman* (1) it was decided that in the Bankruptcy Acts the word "purchaser" means a buyer in the ordinary commercial sense and not a purchaser in the legal sense. The word "purchase" must mean either a purchase in the strictest legal sense and so include even a devise, or a commercial transaction; no middle meaning is possible: *Philpott* v. *St. George's Hospital.* (2)

If "purchase" here means a purchase for consideration, the ultimate trust is for the next of kin of the wife, who are not within the marriage consideration: *Attorney-General* v. *Jacobs Smith.* (3)

Cur. adv. vult.

Dec. 18. HORRIDGE J. The facts in this case are that two leases, one dated May 9, 1817, and the other April 19, 1817, by which Nos. 57, 58, 59, 60, 61, and 62, Chalk Farm Road, St. Pancras, were leased for a number of years, both fell in at Michaelmas, 1910.

On August 1, 1888, and whilst the leases still existed, a conveyance of the reversion on such leases was made to certain gentlemen as trustees, of whom the respondents are the present representatives.

This deed was preparatory to a marriage settlement which bore the same date and by which F. C. Coxhead, the intended husband, brought into settlement certain properties specified in the first schedule and Amy Bruce Gribble, the intended wife, brought into settlement certain stock mentioned in the second schedule, and also brought into settlement the above reversion together with other properties mentioned in the third schedule. The trusts declared by the said deeds as regards such reversion were that the trustees should permit the reversion to remain in the same state and condition in which it then was, or should with the consent of the said Amy Bruce Gribble and the said

(1) (1879) 10 Ch. D. 622. (2) (1857) 6 H. L. C. 338, 367.
(3) [1895] 2 Q. B. 341.

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F. C. Coxhead or the survivor during their, her, or his life, or after the decease of such survivor at the discretion of the trustees, sell, call in, and convert the same into money and with the like consent or at the like discretion invest the proceeds of sale thereof in one or more of the stocks, shares, and securities therein mentioned, and it was thereby agreed that the trustees should stand possessed of the reversion and of the proceeds of sale thereof and of the investments for the time being representing the same on trust to pay the annual income thereof and of the net rents until the sale thereof to the said Amy Bruce Gribble during her life for her separate use independently of any husband and without power of anticipation, and after her death to the said F. C. Coxhead if he should survive her for his life, and after the death of the survivor in trust for the issue of the marriage, and in default of children in trust for such person or persons as the said Amy Bruce Gribble while not under coverture should as therein provided appoint, and subject thereto in trust for her absolutely if she survived her husband, and if not in trust for her next of kin.

The question for me to decide was whether or not, having regard to the two deeds I have referred to and the transfer effected by them, the reversion on the lease had been purchased, within s. 14 of the Finance (1909–10) Act, 1910.

On behalf of the Crown it was contended that the word "purchased" in this section meant purchased in a popular sense and either in the sense of being bought for money or at any rate for money's worth; whilst on the other hand it was contended on behalf of the respondents that purchase had a well-known meaning in English law and meant acquisition of any property otherwise than by descent, or at least that it included any acquisition of property for valuable consideration.

It seems clear that the words purchase or purchaser have a definite and recognized meaning when applied to real property. I need only refer to the definition set out in Williams on Real Property, 19th ed., p. 221, which is taken from Littleton, s. 12, and is also to be found in Termes de la Ley (ed. 1641), p. 228, that "purchase is possession to which a man cometh not by title of descent."

It was argued by the Solicitor-General that although the words purchase and purchaser, in the sense of a noun, may have received that interpretation, there was no case in which the verb purchase had received a similar interpretation. It was pointed out by Mr. Ryde that in this very section the noun purchase is used in correlation with the word purchased.

I think, having regard to the protection intended to be given by the section, that I ought to read the word "purchased" in a commercial sense and with a more restricted meaning than the one given to the word purchaser in real property law. I do not think that under the conveyance and marriage settlement the reversion was purchased within the meaning of this Act.

Mr. Austen-Cartmell in his reply took the point that as there were trusts in favour of the next of kin of the wife who were outside the marriage consideration, to that extent the settlement was voluntary,—*Attorney-General* v. *Jacobs Smith* (1)—and therefore that the reversion was not entirely vested in the trustees; but I do not think this really affects the question.

It may be that the ultimate trust was in certain events voluntary, but this does not make the conveyance to the trustees any less for value, and the reversion was vested in them by the conveyance.

In arriving at my conclusion I have endeavoured to look at the Act of Parliament and to gather the intention of it from the words of the section itself.

I think this appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Godden, Son & Holme.*

(1) [1895] 2 Q. B. 341.

J. H. W.

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Dec. 4, 5, 6.

[IN THE COURT OF APPEAL.]

SMEED, DEAN & CO. *v.* PORT OF LONDON AUTHORITY.

Port of London—Registration of Craft—Sailing Barge—"All lighters, barges, and other like craft"—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 11, *sub-s.* 2 (*f*) (i.).

A sailing barge is within the words "all lighters, barges, and other like craft" in the Port of London Act, 1908, s. 11, sub-s. 2 (*f*) (i.), and is accordingly prohibited from navigating either wholly or partly within the limits of that Act, unless she has been registered by the Port of London Authority.

Judgment of Hamilton J. [1912] 2 K. B. 585, affirmed.

Appeal from the judgment of Hamilton J. in an action tried before him without a jury. (1)

The action was brought to recover a sum of 1*l.* 0*s.* 9*d.*, which had been demanded by the defendants from the plaintiffs under by-law 4 of the Port of London (Registration of River Craft) By-laws, 1910, in respect of the registration by the defendants of the plaintiffs' sailing barge *George*, and paid by the plaintiffs under protest; and also for a declaration that the *George* was not a "lighter, barge, or other like craft" within the meaning of the by-law, and was not required to be so registered, or that, if the natural meaning of those words was such as to include the *George*, the by-law was ultra vires.

The plaintiffs were brick and cement manufacturers carrying on business at Sittingbourne in Kent. The *George* had for several years traded between Milton on the river Swale and London. The Swale is not within the jurisdiction of the defendants. The *George* was duly registered under the Merchant Shipping Act, 1894, her port of registry being Rochester. Her register tonnage under that Act was 41·45 tons, and her dead weight carrying capacity 110 tons. She was a seagoing craft, and had made voyages as far up the coast as Harwich. On the other hand she differed from a ship in that she had wing boards, and had only about three inches of freeboard, which required her cargo in her central compartment to be battened down.

(1) [1912] 2 K. B. 585.

Further details with regard to her character and construction will be found in the judgment of Hamilton J. (1) By the above-mentioned by-law it is provided that "Every person shall on applying to the Port Authority for the registration or for the renewal of the registration of a steam tug, lighter, or barge other than a steam barge or canal barge or canal boat registered by the Port Authority as such respectively pay to the Port Authority the sum specified in this by-law, that is to say:—for every lighter, barge, and other like craft for carrying goods, wares, or merchandises . . . . a sum equal to sixpence for every ton of the tonnage thereof."

The question raised in the action was whether a sailing barge was a barge within the meaning of the words "all lighters, barges, and other like craft for carrying goods" as used in s. 11, sub-s. 2 (*f*) (i.), of the Port of London Act, 1908, and was accordingly prohibited from navigating either wholly or partly within the limits of that Act unless she was registered by the Port of London Authority.

Hamilton J. held that a sailing barge was a barge within the meaning of the before-mentioned words, and therefore gave judgment for the defendants.

Leck, *K.C.*, and *Cranstoun*, for the plaintiffs. (2) It is contended that the word "barge" as used in the Thames Watermen's and Lightermen's Act, 1893 (56 & 57 Vict. c. lxxxi.), does not include a sailing barge, which is a ship within the Merchant Shipping Act, 1894, but refers only to the kind of barges propelled by oars, or towed, such as dumb barges, which are commonly used in unloading ships. The collocation of the term "barge" with "lighter" and "other like craft" and the provisions of the legislation previous to 1908 indicate that this is also the meaning of the term "barge" in the Act of 1908. The term "barge" as applied to a sailing barge, such as the plaintiffs' barge, merely indicates a species of ship with a particular rig, just as the term

(1) [1912] 2 K. B. at p. 592.

(2) It has not been thought necessary to repeat at full length the exhaustive discussion of the various material sections in Acts prior to 1908, which will be found in the report of the arguments in the Court below.

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"brig" or "cutter" indicates another species of ship. Assuming that the term "barge" in the previous legislation does not include a sailing barge, then, it is contended, the word "all" in the Port of London Act, 1908, s. 11, sub-s. 2 (*f*), does not introduce such a barge. Hamilton J. founded his judgment to a great extent upon that word, and said that, in order to give it due effect, it must be construed as meaning all sorts of barges. It is submitted that it is a fallacy to say that, unless so construed, the word is meaningless. It expresses what would, perhaps, be implied in the term "barges" without it, and is equivalent to saying "every barge of the kind included in the previous legislation without exception." The word is fully satisfied by giving it that meaning. A word is not meaningless merely because it expresses what might, from the context, be implied without it, and it is straining the effect of the word to suppose that it was meant thereby to extend the class of barges to which the legislation was to apply.

Hamilton J. in giving judgment recognized various difficulties which would arise from the construction which he was putting on the Act, and he was obviously much impressed by the still greater difficulty which would arise if the result of that construction were that s. 66 of the Watermen's and Lightermen's Act, 1859, applied, and, on coming within the limits of the Port of London, the master of a sailing barge would have to hand over the charge of his vessel to a lighterman's apprentice, who knew nothing about sailing, but the learned judge held that this result would not follow. It is contended that it would follow, and this shews that it could not have been intended to include a sailing barge in this legislation. [They cited *Reed* v. *Ingham* (1); *Blanford* v. *Morrison* (2); *Reg.* v. *Tibble* (3); *Doick* v. *Phelps.* (4)]

G. Wallace, K.C. (*C. B. Marriott* with him), for the defendants. There was evidence in the Court below that from 800 to 900 sailing barges were registered under the Thames Watermen's and Lightermen's Act, 1893. The suggestion that, if sailing barges are included in the term "barges" in s. 11, sub-s. 2 (*f*) (i.), of the Port of London Act, 1908, the result will be that s. 66 of the Act

(1) (1854) 3 E. & B 889.
(2) (1850) 15 Q B. 724.
(3) (1855) 4 E & B. 888.
(4) (1860) 9 W. R. 70.

of 1859 will be applicable, and on entering the limits of the port the navigation of a sailing barge must be handed over to a lighterman's apprentice who only knows how to work a rowing barge, is erroneous. By s. 311 of the Thames Conservancy Act, 1894, it was provided that s. 66 should not apply to lighters passing entirely through the limits of the Act, and by s. 11, sub-s. 2 (*d*), of the Port of London Act, 1908, it is further provided that s. 66 shall not apply to "any lighters on a voyage commencing or ending at any place eastward or westward of the limits of the Act." By the definition clause, s. 3, of the Act of 1894 "lighter" includes "barge." Sub-s. 2 (*f*) (i.) of s. 11 of the Act of 1908 applies only to the registration of craft, and does not apply the provisions of s. 66 of the Act of 1859 to any barges to which it was not previously applicable. By sub-s. 2 (*a*) of s. 11, "the limits of the Watermen's and Lightermen's Amendment Act, 1859, and the Thames Watermen's and Lightermen's Act, 1893, shall, except for the purposes of sections fifty-five, sixty-six, and sixty-seven of the first mentioned Act, be the limits of the Port of London as defined by this Act." Therefore the operation of s. 66 is carefully excluded.

[He was then stopped by the Court.]

Leck, *K.C.*, in reply.

VAUGHAN WILLIAMS L.J. The question in this case is whether a sailing barge is "a lighter, barge, or other like craft" within the meaning of s. 11, sub-s. 2 (*f*) (i.), of the Port of London Act, 1908, and is accordingly prohibited from navigating, either wholly or partly, within the limits of that Act, unless she has been registered by the Port of London Authority. Personally, I think that the question is one of some difficulty. The main object of s. 11, sub-s. 2 (*f*), no doubt, in transferring to the Port Authority the powers of the Watermen's Company was to raise revenue for the maintenance of the port. The by-law in question purports to be made under the powers given by s. 29 of the Thames Watermen's and Lightermen's Act, 1893. The by-law was made for the purpose of carrying into effect the provisions of s. 7 of the Act of 1893, which provides that no craft shall be worked or navigated within the geographical—the

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word "geographical" I put in to explain the next word—the geographical limits of that Act unless a certificate relating to such craft shall have been issued in pursuance of that Act, and shall for the time being be in force. By s. 3 the expression "craft" is defined to mean "any lighter, barge, or other like craft for carrying goods within the limits of this Act," a definition which, so far as the class of craft is concerned, is repeated in s. 11, sub-s. 2 (*f*), of the Port of London Act, 1908, with the addition of "steam tugs." I would here observe that there is no evidence to satisfy me that sailing barges were before the passing of the Port of London Act, 1908, ever required to obtain a certificate under the powers of the Thames Watermen's and Lightermen's Act, 1893, and one would have expected sailing barges to be expressly mentioned in s. 11, sub-s. 2 (*f*), of the Port of London Act, 1908, just as steam tugs were expressly mentioned when it was proposed to place them under the operation of this section of the Act which requires a certificate to be obtained. Hamilton J. in his judgment mentions the fact that the sailing barge *George*, the vessel in question under this Act, is registered under the Merchant Shipping Act, and says that this is by no means conclusive to shew that she does not also require registration under the Port of London Act; and he further says that the reference in s. 11, sub-s. 2 (*f*), of that Act to the river steamboats negatives such a conclusion, and adds these words: "Prima facie, as this sailing barge is a barge, it is within the words 'all barges,' and I think the word 'all' cannot be limited to an enumerative use of that word, but is wide enough to cover all kinds and descriptions of barges. If the clause was intended to deal only with all barges in the enumerative sense, it would have been enough to say that the provisions should extend to 'lighters, barges, and other like craft,' omitting the word 'all'; and therefore, on the plain construction of these words, 'all barges' must include this sailing barge. She is not the less a barge because she is ordinarily propelled by sails." It must never be forgotten that, in construing an Act of Parliament, one must bear in mind what is the subject-matter of the section, and see what is its scope and object, as is pointed out by Bowen L.J. in *Lightbound* v. *Higher*

Bebington Local Board. (1) I wish to say for myself that I do not think, and I do not think that Hamilton J. thought, that, if you put a different construction upon the word "all" from that which he put upon it, you are necessarily treating the word "all" as a meaningless introduction of the word—I think it was said yesterday that it would then be an otiose word; I do not think Hamilon J. really meant that. I think that, whether one takes the word "all" in the sense which Hamilton J. does adopt, or in the other sense which he recognizes as being a possible sense, but does not adopt, he recognizes that there are many considerations which shew that this construction, that is the construction of the word "all" in its wide sense, as being wide enough to cover all kinds and descriptions of barges, is highly inconvenient, and some considerations which make it very difficult to suppose that the wider meaning could have been intended. I dwell on this because it was argued before us yesterday, and of course it was a very forcible argument, that really the only alternative to giving the wide construction to these words which Hamilton J. adopts is to treat the word "all" as being utterly otiose; as I have said, I do not agree; I do not think Hamilton J. meant to be so understood. The plaintiffs' counsel have brought before us, in their excellent and forcible argument, those considerations as to inconvenience which may arise from the construction of the sub-section adopted by Hamilton J. These considerations are indeed, as I have said, fully recognized by the learned judge. I need not repeat them in detail. I do not propose to do so. I reluctantly accept the conclusion of Hamilton J. that the words of s. 11, sub-s. 2 (*f*), of the Act of 1908 are too explicit to warrant the restriction of their scope, or to warrant one in saying that, although the registration provision refers to "all barges," still it does not extend to a sailing barge, merely because the consequence might follow that, at a certain point on her voyage within the area ordinarily navigated by barges, she might have to be taken out of the charge of her master and placed in that of a licensed lighterman or an apprentice. I only mention that one instance of inconvenience because it is the one which

(1) (1885) 16 Q. B. D. 577.

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Hamilton J. particularizes in the concluding words of his judgment. Hamilton J., as I have already pointed out, recognized that there were a number of provisions relating to the obtaining of this certificate which are very difficult to reconcile with the intention of the Legislature being to insist on the certificate being obtained in the case of a sailing barge. It may be that in the pressure of work the House of Commons had not these matters brought before it, but I am afraid we must deal with the Act as we find it. The remedy, if one is needed, must rest with Parliament. The result is that this appeal must be dismissed.

BUCKLEY L.J. The question here is whether the Port of London Authority are entitled to demand payment from the owners of the *George*, the *George* being a sailing barge, of a sum required to be paid under by-law No. 4 of the by-laws for the regulation and the registration of river craft within the Port of London. That by-law was made under powers contained originally in s. 80 of the Watermen's and Lightermen's Amendment Act, 1859, altered and extended by s. 29 of the Thames Watermen's and Lightermen's Act, 1893, and transferred from the Watermen's Company to the Port of London Authority by s. 11 of the Act of 1908. For the determination of the question, the whole point is whether the barge, being a sailing barge, is a barge within the words "all barges" in s. 11, sub-s. 2 (*f*), of the Act of 1908. Hamilton J. has held that she is. In my opinion that decision is right.

Before coming to the sub-section itself, the question being whether "barge" includes "sailing barge," I am going to endeavour to trace through the Acts of Parliament on the subject indications which to my mind shew that there is no discrimination to be made between one floating craft and another by reason of the fact that the one is a sailing craft and the other is propelled by oars or some other means than sails. Beginning with the earliest of these Acts, an Act which is now repealed, 7 & 8 Geo. 4, c. lxxv., I find that the Act of Parliament recites—this is only historical—a number of Acts of Parliament down to and ending with an Act of 10 Geo. 2 in which the

"watermen, wherrymen, and lightermen" are always spoken of as rowing. No doubt at that date rowing was a principal means of propulsion used in the river. After that Act of 10 Geo. 2 I do not find, in regard to these matters which are recited in the preamble of 7 & 8 Geo. 4, c. lxxv., that the reference to the mode of propulsion continues to be the same. It will be found in the subsequent Acts that the words which are used speak of "rowing" with the addition sometimes of the word "working," and sometimes also of the word "navigating." For instance the 7 & 8 Geo. 4, c. lxxv., in s. xxviii. says that "no person shall be admitted a freeman of the company until he shall have rowed and worked," &c. We have a new verb there, and in s. xxxvi. in the same way the expression used is "worked and rowed." To the expression "rowed and worked" s. xxxviii. adds a third word; it speaks of the conviction of a person for an offence, and it says that, if he shall be convicted, he shall be disfranchised, and "shall not be allowed to work, row, or navigate," and, subsequently, the words used are "every person who shall work or navigate." In this Act of Parliament, 7 & 8 Geo. 4, c. lxxv., I find in s. liv. "sailing vessels" mentioned by that name. I need not read it through; it is in a bracket: "(sailing vessels detained by want of wind only excepted)." So that in that Act of Parliament we have got beyond rowing; we have got to "working and navigating," and we have got a first mention of "sailing." In the next Act of 1859, the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.), sailing craft are expressly included for certain purposes. There is a preamble which recites that it is expedient that regulations should be made for the navigation of "barges, lighters, boats, and other like craft carrying goods," and so on. Then there is in s. 2 a definition of a passenger boat, and that is "sailing boat, river steam boat, row boat, wherry, or other like craft, used for carrying passengers." Then s. 3, I think, is instructive: "'Lighterman' shall mean any person working or navigating for hire a lighter, barge, boat, or other like craft." So there the definition does not in terms include sailing, but I am going to shew that to my mind it in effect does so. Then there is a definition of a "waterman." A "waterman" means

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"any person navigating, rowing, or working for hire a passenger boat." There I have the words "working" and "navigating" again, and I have the word "rowing," a waterman being a person who navigates, rows, or works for hire a passenger boat. We have seen that a "passenger boat" includes a sailing boat. A sailing boat is not a rowing boat, and therefore such a boat must be, I think, "worked or navigated"; otherwise the words do not hit it. Consequently the words "working" and "navigating" must there include "sailing." If sailing is to be included, then, going back to the definition of "lighterman," I find that a "lighterman" is a person who works or navigates a barge, and, if the words "work or navigate" include "sailing," the lighterman may sail a barge. So far it is plain that the word "sailing" in the Act applies to passenger boats, and also, I think, that it applies to a barge. Then coming to 1893, the next Act is the registration Act, the Thames Watermen's and Lightermen's Act, 1893 (56 & 57 Vict. c. lxxxi.). It is an Act which entitled the authority to require registration of certain floating bodies to which this legislation applies. I do not know that I need comment in particular on any section of this Act. Sect. 7, of course, is important, but not for my present purpose. Then I come to the Act of 1894, the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.). The Act of 1894 was a Thames Conservancy Act. Sect. 15 provides that "for the purposes of registration" the provisions of the Acts of 1859 and 1893 shall apply to steam tugs and the owners thereof. So there I have a section which provides that the provisions of the Thames Lightermen's and Watermen's Act, 1893, for the purposes of registration shall apply to steam tugs. So we get beyond propulsion by sails, and have to deal with steam tugs. Sect. 16 is one of the clauses dealing with the election of persons authorized to vote as representatives for the election of Thames conservators. It provides that "the qualification of electors of conservators, elected by owners of sailing barges, lighters, and steam tugs, shall be as follows:" Here I have the "sailing barge" mentioned in so many words, and meaning such a floating body as is within the scope of the legislation with which the Lightermen's and Watermen's Acts have to do. I have gone through these enactments

for the purpose of shewing that I cannot myself find any prima facie reason for saying that a "sailing barge" is not a "barge"; on the contrary, I consider that there is a great deal indicating that it is a barge, that sailing is "working" and "navigating" within these Acts of Parliament, and that floating bodies "worked or navigated" are the bodies which are dealt with by this scheme of legislation.

I pass on to the Act of 1908 for the purpose of considering its provisions. The Act of 1908 by s. 11 transferred to the Port of London Authority all powers and duties of the Watermen's Company. It therefore handed over to them this power of making by-laws, and such authority as there was to require registration under the scheme of registration with which I have been dealing. Sub-s. 2 of that section provides that "all enactments relating to the Watermen's Company and the Court of the Watermen's Company shall, so far as not repealed by this Act, and so far as they relate to the powers and duties transferred, have effect as if references to the Port Authority were substituted for references to the company and to the Court," subject to certain provisoes. The material proviso for my present purpose is this: "(*f*) the provisions of the Thames Watermen's and Lightermen's Act, 1893,"—which is the registration Act—"as amended by this Act—(i.) so far as they relate to craft, shall extend to all lighters, barges, and other like craft for carrying goods." The exact question for decision is, what is the meaning there of "all barges"? To these words may be given either one of two meanings. It may be said that the word "barge" there is a word of limited meaning; that it applies and is limited to a certain class of craft, and that "all barges" means every vessel of that class; or, on the other hand, it may be said that the words "all barges" mean all sorts of barges. The question is which of those two meanings is intended. If I take the former meaning and assume that "barge" has a limited meaning, to the exclusion of "sailing barge," and only means every barge of a particular class, then the word "all" becomes meaningless and otiose. With all respect to what the learned President has said, it seems to me that that is demonstrable. If I leave that word out, and assume that "barge"

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has a limited meaning, the Act will have the same effect if it simply ran: "The provisions of the Thames Watermen's and Lightermen's Act, 1893, as amended by this Act, so far as they relate to craft, shall extend to barges," and there is no need to say anything more. If they extend to "barges" of a certain class they extend to every such barge. But I have to take notice that the word "all" is there, and I have to give it a meaning if I can. I can give it a meaning if I say that the words "all barges" mean all sorts of barges. The word "all" thus receives a meaning, and I ought, I think, to give it a meaning. It seems to me that that is the true meaning of the section. Thus far then I arrive at the conclusion that these words include sailing barges for two reasons: firstly because, as it seems to me, sailing vessels are within the scope of the legislation; I cannot find anything to exclude them; and, secondly, because, as I have shewn, these words mean all sorts of barges, and, even if sailing barges without these words would not have been included, I think these words are sufficient to include them.

There is a third consideration, and that is this: the Port of London Authority was being established with very large jurisdiction and very large powers, and it is evident from reading this Act of Parliament that it was recognized that the authority would want revenue. The proviso which immediately precedes proviso (*f*) is a revenue provision: "so much of any such enactment as limits the fees which may be imposed in respect of the registration or licensing of craft and boats, shall be repealed, but the fees so imposed shall not exceed such as may be allowed by a provisional order made by the Board of Trade"; so that the limited fees which theretofore had been taken in respect of these craft were no longer to be kept at their low level; the limit upon them was removed, and a new limit imposed which the Board of Trade was empowered to regulate, but, subject to that, fees could be imposed, and the fee was 5*s.*, if I remember rightly. It is immediately on that proviso that this proviso (*f*) follows, and it is perfectly intelligible that, whereas by proviso (*e*) the Legislature were giving to the authority power to charge more per boat, by proviso (*f*) they were giving power to extend the number of boats upon which the

fee might be charged. I think that the purpose was that the Act of 1893, which allowed registration of boats, was to be altered so as to allow the Port Authority to increase the sum per boat, and that also the area over which the fees might be collected was to be extended so that it might include "all lighters, barges, and other like craft." I think that meant all sorts of lighters, barges, and other like craft.

I do not find myself able to escape from the pressure of the fact that this decision raises many questions of difficulty. I am not going through them. The learned judge went through them and dealt with them, and they are, I think, serious; but, however great they may be, it seems to me that, as a matter of construction, I am bound in dealing with any Act of Parliament, if I find plain words, to give those words their plain effect, regardless of consequences. The consequences may be lamentable, but still, if an Act of Parliament so provides, it must be obeyed. It seems to me that here I have plain words, and, therefore, if the proper interpretation of those plain words results in difficulty, all I can say is, I am sorry for it, but I cannot alter the true construction of those words. I want, however, to add something as to one point by which Hamilton J. was much struck, and in which he finds what would, no doubt, be a formidable difficulty if it existed, but in my view it does not exist. It arises in this way. It is suggested that, if a sailing barge is included in the term "barge" for the purposes of s. 11 of the Act of 1908, the result is that s. 66 of the Watermen's and Lightermen's Act, 1859, will apply to a sailing barge. The effect of that section is that any craft to which the section applies cannot be worked within the limits of the Act of 1893 unless the master employs for the navigation of the vessel a person who may be a mere apprentice who would be qualified if for two years he had rowed a wherry on the Thames. The consequence would, no doubt, be exceedingly formidable if the master of a sailing vessel like the barge in question, through any such clause as that with which I have dealt, were put in the position, immediately he came within the limits of the Act, of being compelled to give place to a boy who might be nineteen years of age, and might have done nothing by way of qualification beyond

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rowing a wherry on the river Thames with a pair of sculls for two years, and who might be without any knowledge of sailing at all. No doubt that would be a formidable difficulty. The learned judge solved that difficulty, but, I confess, solved it in a way which I do not follow. He said this on p. 594: "The answer to that objection is that s. 66 has no application to a sailing barge, for it applies only to barges navigated 'within the limits of this Act,' that is wholly within its limits, and barges navigated wholly within the limits of the Act are not such as are propelled by sails." I do not know whence he gets the proposition that barges navigated wholly within the limits of the Act are not such as are propelled by sails. I know of nothing in this legislation which would prevent a barge which never went outside the limits of the port being navigated by sails. But there is another answer which I think is a satisfactory one, and it is this. Sect. 311 of the Thames Conservancy Act, 1894, dealt with s. 66 of the Watermen's and Lightermen's Act, 1859, which is the one which requires the employment of the services of this very moderately experienced master. That section says: "Nothing . . . . in section 66 of the Watermen's Company's Act shall apply to any lighters passing entirely through the limits of that Act"; so that, if a lighter came from outside the limits, navigated through the limits, and concluded its journey outside the limits, it is not bound to take the apprentice on board to assist in passing through the limits. That Act of 1894 was subsequently amended by s. 11, sub-s. 2 (*d*), of the Act of 1908, by adding words to the effect that this lighterman's apprentice clause shall not apply "to any lighters on a voyage commencing or ending at any place eastward or westward of the limits of that Act." So that now the section as amended is a section which has this effect: that s. 66 compelling the employment of an apprentice or a lighterman does not apply either to a lighter which begins its journey outside the limits and ends it outside the limits—that was the section as it originally stood—or to a lighter which commences its journey outside the limits and finishes it inside the limits, or which commences its journey inside the limits and finishes it outside the limits. By the definition clause, s. 3, of the Act of 1894 "lighter" includes

"any barge or other like craft for carrying goods"; and the result of the section is that a lighter thus defined, which would therefore include a barge, and include a sailing barge, is not bound by s. 66 of the Act, which compels the employment of the apprentice. That difficulty therefore is gone. I do not say that there are not still formidable difficulties. I think there are; but notwithstanding those difficulties I arrive at the conclusion, for the reasons I have given, that the words "all barges" in s. 11, sub-s. 2 (*f*), of the Act of 1908 include sailing barges. The result of that is that this barge is one that requires registration, and to which by-law No. 4 applies. I therefore think that the appeal fails.

KENNEDY L.J. I am of the same opinion. The sound principle, in dealing with a statutory enactment, is to construe plain words in their natural sense. It is for us so to construe them; it is the province of the Legislature to remove any inconvenient, or, as some people might judge, unjust, results, which may be traced to the construction of the plain words of the enactment construed as according to their natural meaning they ought to be construed. Here the words are "all lighters, barges, and other like craft for carrying goods navigating either wholly or partly within the limits of the Act." The plaintiffs' counsel, in the very able arguments addressed to us by them, say: "Do not construe the words as meaning all lighters, barges, and other like craft for carrying goods, but except from them barges, the motive power of which consists in the use of sails." I must decline to do so. It is clear that a sailing barge is a barge in the ordinary sense, and, when the words are "all barges," I have no right, as it appears to me, to exclude from the plain language used something which I may be led by other enactments to think it might have been convenient or desirable for the Legislature to exclude from the general enactment. I agree that there are some inconveniences apparently arising from the view of the enactment which we are taking. I think myself that the inconvenience which seems to have impressed Hamilton J. more than any other, namely, that which arises from s. 66 of the earlier Act of 1859, has been met by the view of the relation of this Act of 1908 to the earlier

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statutes which was put before us by Mr. Wallace, but there still are some difficulties which remain. I cannot, however, consider those difficulties as entitling us to reject the natural meaning of the enactment; and I would merely say with regard to the past that I can trace in the argument addressed to us, which has carefully gone through the earlier legislation, nothing which would justify me in saying, either with regard to the Watermen's and Lightermen's Acts or to the Thames Conservancy Act, that those who prepared those enactments drew a distinction between a "sailing barge" and a "barge" for purposes akin to those which are the purposes of the Act of 1908. It appears to me that, if I wanted an inference from past legislation to help me, which I do not, in construing this Act, it is distinctly a point in favour of the decision in the Court below, that I cannot find that at any point the word "barge" has been so used as to exclude sailing barges. The term "barge" in ordinary parlance, whether in regard to the carriage of goods, or other purposes for which one knows barges were used in times past, does not connote the absence of sails; it never has done so, as far as I know; certainly it does not as far as I have discovered from anything in the statutes to which our attention has been called. The thing that strikes me most is that, whereas in the Act of 1859 which has been referred to the word "boat" is connected with "barge, lighter, or other craft," the word "boat," if I follow the history of the legislation correctly, disappears in that connection from that date, and we get such words as "lighters, barges, and other like craft." I suppose one is at liberty to conjecture that, because of the gradual increase of the size of these helps to the trade of the Port of London, and of the loading and unloading of ships, and the amount of the cargo which had to be carried, it has been found desirable to add to the use of oars, which were alone used in the earliest stages, sails, and now steam in many cases, to the methods of propulsion. If the earlier legislation does not make any distinction between sailing and other barges, I should say that that is some sort of confirmation of the view that the "barge" is to be treated in the section in question as indicating the genus, and not merely a species of barge which is distinguished by the fact that it is propelled in a particular way. In the Thames

Conservancy Act, 1894, there is a reference to the owners of sailing barges which shews that as early as 1894 the use of sailing barges was contemplated; and, therefore, if the Legislature were minded to create a distinction between sailing and other barges in regard to legislation in years following, I think they would have marked such a distinction as the earliest of these clauses suggests.

Lastly, it seems to me that, if we may consider the reasonableness of this legislation, there is the fact that the sailing barge, at least as much as the lighter or barge propelled by oars, is making profit for its owner out of the use of the appliances and docks, and the trade of the Port of London; and, inasmuch as this is apparently a financial measure, the owners of a sailing barge may be not unreasonably included amongst those who have to pay this sum, whatever it is, for the certificate upon registration. When it is said that some of these barges are of a character which will require them also to be registered as ships for the purpose of the Merchant Shipping Act, I can for my part see no reason in that fact, if they are using the Port of London, especially with the frequency that these barges do, why they should not come under the same category as "lighters and other like craft carrying goods," as mentioned in this Port of London Act, 1908, s. 11, sub-s. 2 (*f*) (i.). The ground of my decision is that which has been already stated in this Court by my colleagues, and is the ground upon which the decision in the Court below rested, namely, that, even if all the inconveniences existed which were suggested, that would be no reason for disregarding the plain words of the Act and not construing them in a natural manner; and further, if it were necessary to go beyond that, I think, as I have said, that that which appeared to Hamilton J. to be the greatest of the difficulties, though not the only one, has been in fact removed by the argument of Mr. Wallace. I may also say that, apart from the word "all" in the statute, it does appear to me that this appeal labours under the difficulty that a "barge" in itself is in practice a thing which may be propelled by sails, and, if the word "all" had not been there, I myself should have been very slow to say that the word "barge" did not cover a barge

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whether propelled by oars or by sails. I think this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Jackson, Bowles & Jackson.*
Solicitor for defendants: *E. Glenshaw.*

E. L.

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[IN THE COURT OF APPEAL.]

PLANT *v.* COLLINS.

DEELEY, CLAIMANT.

County Court—Interpleader—Judgment for a Debt—Goods of Judgment Debtor taken in Execution and sold—Claim by Assignee of the Debt to Proceeds of Sale—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 156, 157—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6; *s.* 89.

Where a creditor, who has assigned a debt together with all securities for the same, subsequently recovers judgment against the debtor in the county court, and the goods of the judgment debtor are taken in execution and sold, the assignee of the debt cannot claim the proceeds of sale under ss. 156 and 157 of the County Courts Act, 1888.

Judgment of Divisional Court (Ridley J. and Lush J.) [1912] 2 K. B. 459, affirmed.

APPEAL from the judgment of a Divisional Court (Ridley J. and Lush J.) affirming on appeal a judgment of a county court judge. (1)

In 1908 the plaintiff, Plant, by deed assigned to the claimant, Deeley, all book and other debts and sums of money then and thereafter to become owing to him, whether for costs, money lent, or money paid by him, in connection with his business and profession of a solicitor, together with all securities for the same; and Plant appointed Deeley to be his attorney for him and in his name or otherwise to demand, receive, sue for and recover the said costs, debts, and sums of money thereby assigned.

In 1911 Plant sued Collins in the county court for the sum of 10*l.* due for costs, and Collins set up a counter-claim for damages

(1) [1912] 2 K. B. 459.

for negligence. In the result, on December 15, Plant recovered judgment for debt and costs, amounting in all to 37*l.* Execution was issued, and goods of Collins were seized and sold, the net proceeds of the execution being 31*l.* On January 2, 1912, Deeley gave formal notice to the high bailiff that he claimed the proceeds of sale by virtue of the assignment to him by Plant; the high bailiff gave Plant notice of this claim, and on January 16 issued a summons to Deeley under s. 157 of the County Courts Act, 1888, to appear and support his claim; and on January 23 Deeley duly gave particulars of his claim to the high bailiff and to Plant, stating that he claimed the sum of 31*l.* in the hands of the high bailiff, being the amount realized under the execution against Collins, upon the ground that he was entitled thereto by virtue of the deed of assignment of 1908. On December 23, 1911, Deeley had given Collins written notice of the assignment of 1908.

At the hearing of the interpleader summons the county court judge held that Deeley was not entitled to any part of the sum o 31*l.*, because he shewed no title to the goods taken in execution, and gave judgment in favour of Plant. Deeley appealed to the High Court. The Divisional Court dismissed the appeal, but ordered that the money should not be paid by the high bailiff to any person for fourteen days, pending an application by Deeley to the county court judge for an order in respect of it.

McCardie, for the claimant. Even if ss. 156 and 157 of the County Courts Act, 1888, did not apply to this case, the county court judge, having the parties before him under the summons issued, which is quite general in its form and is merely a summons calling on the claimant to appear before the Court and support his claim, had power, in the exercise of his general jurisdiction, under s. 89 of the Judicature Act, to adjudicate upon the rights in equity of the claimant under his assignment as against the judgment creditor, and should have decided that the claimant was entitled to the money which he claimed, inasmuch as there cannot be any doubt on the facts that he, being entitled to the debt and all securities for it, was entitled in equity to that money. There is no formal interpleader issue in the county court as to whether the claimant is entitled to the goods taken in

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execution. It is submitted, however, that s. 157 of the County Courts Act, 1888, does apply in terms to any case in which a claim is made to the proceeds of sale of goods taken in execution. The party interpleading, here the high bailiff, has not to determine, before interpleading, as to the validity of the claim; the object of interpleading is to avoid having to do so. It is sufficient for him that the money in his hands as the proceeds of the execution is the subject of rival claims. [He cited and relied upon the Judicature Act, 1873, s. 25, sub-s. 6, and Order LVII., r. 1, and *Carolan* v. *Harrington & Son* (1) and *Roberts* v. *Death.* (2)]

Barrington Ward, for the judgment creditor, was not called upon to argue.

VAUGHAN WILLIAMS L.J. In my opinion the Divisional Court were right in affirming the judgment of the county court judge. It was suggested by the counsel for the claimant somewhat reluctantly, I think, that s. 157 of the County Courts Act, 1888, assisted him in some way or other, but that suggestion was made after he had in the first instance rather disclaimed the assistance of that section. He repented, however, I think, of that course later in the argument, and fell back upon that section. That section, so far as material, is as follows: "If any claim shall be made to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and the judge shall adjudicate upon such claim, and make such order between the parties in respect thereof and of the costs of the proceedings, and shall also adjudicate between such parties, or either of them, and the high bailiff with respect to any damage, or claim of or to damages, arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit." That section really deals with the case of a claim made to goods taken in execution or to the proceeds of a sale thereof as

(1) [1911] 2 K. B. 733. (2) (1881) 8 Q. B. D. 319.

representing the goods. The present case is not such a case. The claimant here, though his claim purports to be to the proceeds of goods taken in execution within the meaning of the section, is really seeking to enforce an assignment of the debt, in respect of which judgment was recovered in the county court. I think the case is clearly not within s. 157, and that the county court judge's decision was perfectly right, on the ground that the making of such an order as was asked for by the claimant upon the summons taken out by the high bailiff was not justified by any provision of the County Courts Act, 1888, or of the Judicature Acts. My principal anxiety in this case has been that, if there really is any question as between the judgment creditor and the claimant as to the assignment of this debt, it seemed to me very desirable that it should be settled, and settled as easily and inexpensively as possible. My attention had not been called to the terms of the order made by the Divisional Court, but I find that it occurred to them, as it had occurred to me, that it would be proper that an opportunity should be given to the claimant of asserting his right by other proceedings in the county court, for I find that, after affirming the judgment of the county court, they further ordered that the money should remain in the hands of the high bailiff for fourteen days. Therefore we have simply to affirm their order with the exception that the period will be extended to fourteen days from the date of our order.

BUCKLEY L.J. Plant brought an action for a debt of 10*l.* in the county court against Collins, and recovered judgment for the debt and costs, amounting in all to 37*l.* Execution was issued upon the judgment, and the high bailiff seized and sold goods of Collins. The sale realized the sum of 31*l.*, which was in the hands of the high bailiff. Plant had previously to the action executed an assignment to Deeley of "all book and other debts and sums of money then and thereafter to become owing to him for costs, money lent, or money paid by him, in connection with his business and profession of a solicitor, together with all securities for the same." Deeley claims to derive title from Plant under this assignment to the money in the hands of the high bailiff. Deeley having asserted his right to that money by

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virtue of the assignment to him, the high bailiff took out an interpleader summons, calling upon him to appear in the county court and support his claim. That was a proceeding under s. 157 of the County Courts Act, 1888. It appears to me to have been wrong. That section deals with a case in which a claim is made "to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof." Deeley had no title to the goods taken in execution, nor had he any title to the proceeds or value thereof as representing the goods. What he had a right to was the debt which had been assigned to him. I observe that Lush J. said at the end of his judgment in this case: "I wish to make it clear that I do not think that the interpleader proceedings were improperly taken, as has been suggested. It seems to me that they were properly taken, for all that the high bailiff knew was that he had in his hands the proceeds of the sale of goods taken in execution, and that two persons were claiming the money. I think that the high bailiff was quite justified in taking these proceedings under s. 157." With all respect to the learned judge I do not agree with him. I do not think that it was competent for the high bailiff in this case to take these proceedings. The counsel for the claimant fell back upon the proviso to sub-s. 6 of s. 25 of the Judicature Act, 1873, which provides, in the case of an assignment of a debt or chose in action under the sub-section, that "if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same." The case does not come within that provision. The high bailiff is not a "debtor, trustee, or other person liable in respect of such debt or chose in action"; he is merely a stakeholder in whose hands is money in respect of which his only interest is to hand it to the person really entitled to receive it. Then reliance was placed upon Order LVII., r. 1, of the Rules of the Supreme Court, which provides that "relief by way of interpleader may be granted

(*a*) where the person seeking relief . . . . is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties . . . . making adverse claims thereto." I do not think that the high bailiff is a person who is under liability for any debt, money, goods, or chattels within the meaning of that rule. In my opinion proceedings by way of interpleader were inapplicable to this case, and the taking out of the interpleader summons here was wrong. It is right, I think, that an opportunity should be given to the claimant of taking proceedings, if so advised, in order to intercept the money in the hands of the high bailiff. This he may do by way of plaint in the county court against Plant. He could then ask that the high bailiff be restrained from parting with the money, and that it shall remain in his hands until the matter of that plaint has been determined. I agree that this appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. It seems to me that the attempt to bring this case within s. 157 of the County Courts Act, 1888, wholly fails. The case is clearly not within that section, which deals with goods taken in execution, or the proceeds of a sale of them as representing the goods, in a case where a question arises as to whether the goods seized belonged to the execution debtor or to a claimant of them. In this case no question arises, or could have been raised by the claimant, as to the title to the goods taken in execution. The question which the claimant desires to raise is whether or not he is entitled under the deed of assignment executed in 1908 to the debt recovered in the county court, and, I suppose, also the costs recovered by Plant in the action. The proceedings contemplated by s. 157 of the County Courts Act, 1888, do not appear to me to have any relation to such a claim as that of the claimant in this case. The summons issued under that section was in my opinion wholly erroneous. I agree with what my brother Buckley has said on that subject, and I respectfully differ from the observations which Lush J. appears to have made at the end of his judgment in the Court below. It was ably argued by the counsel for the claimant that, whether the case was within s. 157 or not, the county court

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Kennedy L.J.

judge, having the parties before him under the summons, had, in the exercise of his general jurisdiction as a county court judge administering justice in his Court, a right to make an order that the money in the hands of the high bailiff should be paid over to the claimant as being entitled thereto under the assignment of 1908. I do not think that is so. It appears to me that upon the interpleader proceedings before him the county court judge could only make an order deciding the question which was raised for decision by those proceedings. I cannot find that he had on those proceedings any such general jurisdiction as is suggested. I think that the order of the Divisional Court was right, and that the rights of the claimant are sufficiently protected by the portion of the order which gives him time, if so advised, to assert his rights under the assignment of the debt to him by other proceedings.

Appeal dismissed.

Solicitors for claimant: *Field, Roscoe & Co., for F. Deeley, Dudley.*

Solicitor for judgment creditor: *C. F. Smith, for Plant, Dudley.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1912
Nov. 16.

RAY *v.* NEWTON.

Practice—Solicitor—Agreement as to Costs—Bill of Exchange—Bill taken as Payment—Payment not to be enforced for Two Years—Delivery of Bill of Costs—"Fair and reasonable"—Attorneys' and Solicitors' Act, 1870 (33 *&* 34 *Vict. c.* 28), *s.* 4—*Solicitors' Remuneration Act*, 1881 (44 *&* 45 *Vict. c.* 44), *s.* 8, *sub-ss.* 1 *and* 4.

A solicitor cannot evade his obligation to deliver a bill of costs by taking a bill of exchange from his client for an agreed amount.

On March 22, 1910, the defendant entered into an agreement with his solicitor, whereby the defendant agreed the costs due from him to the solicitor for work done at the sum of 2000*l.* and gave him a bill of exchange for that amount payable on demand; the payment not to be enforced for two years. In 1912 the receiver of the property of the solicitor's firm, appointed in a partnership action, presented the bill, which was dishonoured, and then brought an action on the bill in the name of the firm against the defendant, claiming 2000*l.* and interest from March 22, 1912. The defendant obtained leave to defend the action and, without delivering a defence, he issued a summons (which was not intituled in the matter of the Solicitors Acts) asking for an order that the plaintiffs should deliver to him a complete bill of costs for work done up to December 11, 1909; that the agreement should be inquired into under s. 4 of the Attorneys' and Solicitors' Act, 1870, and s. 8 of the Solicitors' Remuneration Act, 1881, and the bill taxed; and that proceedings in the action should be stayed:—

Held, that the client was entitled under the Acts of Parliament to have a complete bill of costs delivered and an inquiry into the agreement; that the solicitor could not escape from this liability by taking a bill of exchange for the agreed amount; that the summons must be headed under the Acts of Parliament; and that the action ought not to be stayed.

Appeal from a decision of Rowlatt J.

In the year 1909 the defendant, Mr. F. C. Newton, had involved himself in liabilities to the extent of upwards of 60,000*l.* He had mortgaged all his property and was the next tenant for life of large estates in Leicestershire, but his interest therein would be forfeited on bankruptcy. The plaintiff Mr. P. C. Ray was a solicitor, and in October or November, 1909, accepted the duty of endeavouring to free him from his liabilities. Mr. Ray for some time devoted his attention to the defendant's business to the exclusion of all other work. He succeeded in obtaining from the present

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tenant for life a loan of 60,000*l.* which was applied in settling the various claims against the defendant, who was thus freed from his liabilities and the danger of bankruptcy. On March 22, 1910, an agreement was made between the plaintiff and defendant as to costs. A bill of exchange of that date was drawn by the plaintiff's firm upon and accepted by the defendant, payable on demand.

At the same time letters were exchanged between the parties as follows:—

"58 Margaret Street
"Regent Street
"London, W.
"22nd March 1910.

"To Messrs. Ray, Flower-Ellis & Simon
"58 Margaret St. W.

Stamp 6*d.*

"I agree your costs up to the 11th day of December 1909 at the sum of two thousand pounds (2000*l.*) for the work you have done and the loans you have arranged to that date and I hand you herewith my acceptance for that amount payable on demand in consideration of your refraining from enforcing payment thereof for a period of two years from this date, and also in consideration of your conducting my affairs from the 11th day of December 1909 to the present time and until the matters relating to my uncle and myself are concluded, but you are to render me a detailed bill of costs of all work done and payments made in connection with the matters in which my uncle and I are concerned and in regard to my interest in Blanchards (London) Limited and Savoy Mansions Limited as from the 11th day of December 1909 and for this I am only to be responsible as and when your account is delivered.

"(Sd.) F. C. Newton."

"58 Margaret Street
"Regent Street
"London, W.
"22nd March 1910.

Stamp 6*d.*

"To Francis Curzon Newton Esq.

"In consideration of your handing us your acceptance payable on demand for 2000*l.* the amount of our agreed costs to

the 11th day of December 1909 and of the agreement entered into by you to-day as to payment of our costs as from the 11th day of December 1909 we undertake that you shall not be called upon to pay any sum in respect of your acceptance for a period of two years from this date.

"(Sd.) Ray, Flower-Ellis & Simon."

As a result of proceedings in a partnership action a receiver of the assets of the firm was appointed, and he, in the execution of his duty, presented the bill for payment on March 22, 1912. It was dishonoured, and on June 11, 1912, he issued a specially indorsed writ in the name of the firm against Newton, claiming 2000*l.* and interest from March 22, 1912. The defendant had not yet come into possession of the estate and was unable to meet the claim. He applied for and obtained from the Master on July 23, 1912, unconditional leave to defend the action, and on October 12, without delivering a defence, he issued a summons (which was intituled in the action but not in the matter of the Solicitors' Acts) asking for an order that the plaintiffs should

1. Deliver to the defendant a complete bill of costs with dates and items for work done by them for the defendant up to December 11, 1909, in respect of which the bill of exchange sued upon in this action was given, and in respect of which an agreement contained in two letters, both dated March 22, 1910, was entered into between the plaintiffs and defendant.

2. That the said agreement might be examined and inquired into under s. 4 of the Attorneys' and Solicitors' Act, 1870, and s. 8 of the Solicitors' Remuneration Act, 1881.

3. That the said bill of costs when delivered might be referred to a taxing Master pursuant to the said Acts.

4. That pending the delivery and taxation of the said bill of costs and the examination of the said agreement all proceedings in this action should be stayed.

The summons was dismissed, and the defendant appealed to Rowlatt J., the judge in chambers. His appeal was also dismissed, but the learned judge gave leave to appeal.

The defendant now appealed from that decision. He alleged that if a bill were delivered it would appear that most of the items related to litigation on behalf of companies of which he

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was a director, for the costs of which he was not personally liable; that the costs due to the plaintiffs for work done for him personally up to December 11, 1909, were very small; that no consideration was given for the agreement and that he signed it at the direction of Mr. Ray; that he did not intend to make himself liable for costs for work done for any of the companies; and that the agreement was unfair and unreasonable within s. 4 of the Attorneys' and Solicitors' Act, 1870, and s. 8 of the Solicitors' Remuneration Act, 1881.

All these allegations were contradicted by Mr. Ray.

E. W. Hansell, for the appellant. A solicitor cannot evade the obligation to deliver a bill of costs by taking a bill of exchange from his client for an agreed amount. Under s. 4 of the Attorneys' and Solicitors' Act, 1870 (1), which refers to contentious business, and s. 8, sub-s. 4, of the Solicitors' Remuneration

(1) Sect. 4 of the Attorneys' and Solicitors' Act, 1870, is as follows: "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a Court or a judge to be taken thereon by motion or petition, and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

Sect. 8, sub-ss. 1 and 4, of the Solicitors' Remuneration Act, 1881:

"(1.) With respect to any business to which the foregoing provisions of this Act relate, whether any General Order under this Act is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the

Act, 1881, as to non-contentious business, he may make an agreement with his client for the amount of his remuneration, but if the client objects that the agreement is unfair or unreasonable the taxing Master may inquire into the facts and certify the same to the Court, and the Court may cancel or vary the agreement. If there is any suspicion of unreasonableness the Court will order a bill of costs to be delivered and referred to the taxing Master for inquiry and taxation: *In re Frape* (1); *In re Palmer.* (2) This application was properly made by summons in chambers: *In re Howell Thomas.* (3)

There is nothing to take away the right of the client to have a bill delivered and taxed. It may be admitted that the appellant received some consideration for the bill of exchange, but it would be open to him to shew failure of consideration, and absence of consideration, total or partial, would be matter of defence in an action on the bill of exchange: Chalmers' Bills of Exchange, 7th ed., p. 105, r. 2, p. 108, r. 4. The bill of exchange has not been negotiated, and as between immediate parties there is nothing to prevent an inquiry into the consideration for the acceptance. The plaintiffs must deliver a bill of costs notwithstanding the agreement: *In re Stuart* (4); *In re Baylis.* (5) It cannot be decided whether the agreement is fair and reasonable

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solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly."

"(4.) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing Master or officer of the Court may inquire into the facts, and certify the same to the Court; and if, upon such certificate, it shall appear to the Court or judge that just cause has been shown either for cancelling the agreement, or for reducing the amount payable under the same, the Court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the Court or judge may seem fit."

(1) [1893] 2 Ch. 284, 295.
(2) (1890) 45 Ch. D. 291, 298.
(3) [1893] 1 Q. B. 670.
(4) [1893] 2 Q. B. 201.
(5) [1896] 2 Ch. 107.

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or not till the bill of costs has been examined. In equity the bill of exchange is only a security for the liability of the appellant and ought to be inquired into by the Master.

Alexander Neilson, for the plaintiffs in the action. One of the points at the trial of the action will be that the agreement has put an end to the statutory right to have a bill of costs delivered; and if delivery of a bill is ordered on this summons the plaintiffs will be deprived of their right to raise this point. It would be a hardship on the plaintiffs to order the delivery of a bill of costs, for if the action is successful the bill will be superfluous. The appellant could not have obtained the order for delivery of a bill of costs if the plaintiffs had not brought their action, for the existence of the bill of exchange and the agreement would have been a complete answer to his claim. Delivery of the bill of costs ought not to be ordered at this stage, although it may be proper to make the order if the action is unsuccessful. This is only an interlocutory application, and the Court cannot go into the merits; but in any view the agreement is reasonable; payment is postponed for two years, and if the defendant dies before the tenant for life the plaintiffs get nothing. Rowlatt J. has exercised his discretion and this Court will not interfere with his order. There was consideration for the bill of exchange, and the plaintiffs' action is practically undefended.

Hansell, in reply. The appellant ought not to be called upon to put in his defence till he has seen the bill of costs. After that he may desire to pay money into Court.

FARWELL L.J. This is an appeal in an action, and I pause to say that it should be amended by being intituled in the Solicitors' Acts also, because it is an application under the Solicitors' Acts as well as an action on a bill of exchange. The bill of exchange in question was for 2000*l.* and was given in consideration of an agreed sum of costs for work done. There is a dispute on the affidavits whether the work was done by the solicitors between some time in October and December 11, or between November 29 and December 11. [His Lordship read the letters set out above.]

The action has been brought by the receiver in an action for the dissolution of the solicitors' firm in the name of the firm.

They sue the acceptor of the bill of exchange. The defendant desires to have the agreement looked into under the two Solicitors' Acts of 1870 and 1881. The Act of 1870 was the first Act which gave the solicitor power to make agreements of this kind for payment of his costs and as to the amount of his costs, and this power is qualified by the proviso that "when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement"; and power is given to the Court or a judge to say that the agreement ought to be cancelled altogether, or ought to be modified and moderated in amount. This makes the inquiry into the agreement, when a prima facie case is made, a condition precedent to the receipt by the solicitor of any money under it. Then there is a further enactment which gives power to enter into agreements as to non-contentious business in the Solicitors' Remuneration Act, 1881, s. 8, which I will not pause to read now. Sub-s. 4 says "The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing Master or officer of the Court may inquire into the facts, and certify the same to the Court," and so on. Now here it is suggested not that there is any fraud or dishonest conduct, but that 2000*l.* for the work alleged to have been done is wholly unreasonable; and prima facie it does seem a very large sum in respect of costs incurred during such a short period. Explanations have been suggested by the affidavits, but they do not appear to me to be anything like the satisfactory explanation to which the client is entitled.

Under the statutory jurisdiction the solicitor is bound to render a bill of costs to his client, and his client is entitled to have the bill delivered under the common order to tax; no special circumstances are required. The solicitor may avoid the

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Farwell L.J.

stringency of that liability in various ways; and one is by taking payment from his client. A bill of exchange is not payment; it is only conditional payment. The solicitor cannot in my opinion escape from the Act by taking a bill of exchange from his client. The bill of exchange is simply a means of giving him a summary remedy under the Bills of Exchange Act. But the substance underlying the bill of exchange is left untouched, and that in this case is the solicitor's bill. Under the old procedure, if there was no defence at law, the circumstances of this case would undoubtedly have created an equity, by virtue of which the Court of Chancery would have restrained the action at law on the bill; or would have restrained the solicitor from so negotiating the bill as to give rights to a purchaser for value without notice, who might defeat the equity or the statutory right which the client had under the Act. I think it would be exceedingly wrong to give any encouragement to the idea that a solicitor can evade these Acts by taking a bill of exchange from his client. I therefore treat the case as one in which we have to consider whether the agreement is reasonable or not, and in order to do this it is essential to see the bill. We know none of the details. Of course the mere suggestion, under ordinary circumstances, that the amount is unreasonable is not enough to justify an inquiry; but, on the other hand, when we are told the length of time occupied, and the sort of work done, and it is suggested that part of the work done was not for the client in his personal capacity, but as one of the directors of other companies, and that the bills were really the companies' bills, the case requires to be looked into and considered by the proper officer. In my opinion, therefore, the order should go under both these statutes; there should be a reference to the taxing Master to inquire into this agreement to see whether it is fair and reasonable or not; and, when he has made that inquiry, the matter will practically be settled. However, we do not propose to stay the action. There is no reason why the defendant should not plead so that he may be ready to go to trial the moment this is over. The order will be for delivery of the bill—that goes as a matter of course. We must also order taxation, but the taxation will not proceed unless

and until the taxing Master has inquired into the reasonableness and propriety of the agreement, and has either disallowed it altogether or qualified it in some way. If then it becomes necessary to tax he will tax; if not he will not. There must be delivery of the bill within twenty-eight days from to-day.

HAMILTON L.J. I agree. To my mind there are two quite distinct proceedings. There is the action on the bill of exchange which goes on; and there is Mr. Newton's application for taxation of the plaintiffs' bill of costs, which involves as a first step delivery of their bill of costs in order that it may be referred to taxation. Any agreement if set up, as no doubt it may be, can then be investigated by the taxing Master. I think, although it may be a pure matter of form, the application should have been headed in the Solicitors' Acts, and not only as an application in the action itself. The application is supported by an affidavit of Mr. Newton, which contains quite sufficient materials for an investigation into the fairness and reasonableness of the agreement. Nearly every point in this case is in acute controversy, and I express no opinion whatever as to the result of that controversy; but in the first instance the appellant makes out amply sufficient grounds for obtaining the order that he seeks. It is suggested that the time at which that order should become operative is in the discretion of the Court, and that the Court below exercised a discretion on the point. Having regard to the recollection of counsel, which in most respects is entirely in accord, and having regard to the fact that the matter had been before the Master before it came before Rowlatt J., I do not think it can be said that the learned judge or the Master exercised discretion in such a way as makes it improper for this Court to review or interfere with the order. Nor do I see what discretion there can be with regard to making the order for the delivery of the bill of costs, as soon as sufficient facts have been shewn to raise a case of unfairness or unreasonableness.

The next suggestion is that no such order can be made where it is perfectly clear that the proceedings will be wholly fruitless; that the action is an undefended action; that judgment must ultimately be recovered; and that any

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Hamilton L.J.

investigation of this agreement therefore becomes academic. The position of the action, however, is that there is unconditional leave to defend and no defence put in, and although no doubt it would be a matter of comment if the defence travelled beyond the affidavit under Order XIV., that affidavit is not conclusive, and it is impossible to tell what facts may be discovered and relied on by the time the trial comes on. I think we cannot assume that there is no defence to this action, and I express no opinion at all as to the chances of the action succeeding or failing. If that is so, then the suggested answer to the prima facie right to have a bill of costs delivered fails.

It is then, as I understand, also suggested that the fact that a bill of exchange has been given for the amount mentioned in the agreement on which the solicitor relies is an answer to the claim for the delivery of the bill of costs. But from this point of view the bill itself is no more than another agreement to pay 2000*l.*, and therefore is as much the subject of investigation as the agreement of March 22, 1910, itself.

I have therefore come to the conclusion that the appeal ought to be allowed, and the order for delivery of the bill and reference to taxation be made. But I can see no reason for interfering with the progress of the action on the bill of exchange in any way, and I do not desire that anything that I say should in any way affect the question, should it be raised, of extensions of time for any particular step which may be asked for upon proper materials in the course of that action. I do not know enough about the action, when all is said and done, to justify me in making any observations about it, except that it must proceed if the parties are so advised. Certainly the suggestion that the defence should not be delivered until some number of days after the delivery of the bill appears to me to be too much in the nature of a confession that there is no defence until a bill of costs has been seen, and I do not wish to assume that, as against a defendant who has got unconditional leave to defend, of which no doubt he will make the fullest use.

Appeal allowed.

Solicitors: *Young, Jackson, Beard & King; Louis H. Falck.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1912
Dec. 14.

JOHNSON *v.* REFUGE ASSURANCE COMPANY, LIMITED.

Practice—Time for appealing—County Court Action—Appeal from County Court—Appeal from Judgment of Divisional Court on such Appeal—Final Order—"Matter not being an action"—Order LVIII., *r.* 15—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 100.

An appeal from the order of a Divisional Court, dismissing an appeal from a final judgment in a county court action, is an appeal from a final order in an "action" within the meaning of Order LVIII., r. 15, and therefore such an appeal may be brought within the period of three months from the order of the Divisional Court.

APPLICATION for extension of time for appealing from the judgment of a Divisional Court on an appeal from a county court.

In an action in the Manchester County Court the judge on November 1, 1911, gave judgment for the plaintiff for the sum of 97*l.* 3*s.* The defendants appealed from his judgment to the High Court, and on May 1, 1912, the Divisional Court (Phillimore and Bray JJ.) gave judgment, dismissing the appeal with costs. They gave leave to appeal, on the terms that 50*l.*, part of the 97*l.* 3*s.*, which the defendants had paid into Court, should be paid out to the plaintiff, and that the rest of the money should remain in Court. On May 7 the defendants' solicitor wrote to the plaintiff's solicitor, asking for a copy of the order of the Divisional Court as drawn up, in order to enable his clients to have the notice of appeal settled, but received no answer. On May 18 the defendants' solicitor wrote again to the plaintiff's solicitor, asking for a copy of the order. On May 20 the plaintiff's solicitor delivered to the defendants' solicitor a draft order, which contained a direction that, if an appeal should not be brought within fourteen days from May 1, 1912, the whole of the money standing to the credit of the action in the county court should be paid out to the plaintiff or his solicitor. On May 20 the defendants' solicitor wrote to the plaintiff's solicitor, stating that this direction was not given by the Divisional Court, and requesting him to have the order drawn up with the direction omitted therefrom. On June 6 the order was drawn up in the Crown Office, and, though

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objection was taken on behalf of the defendants to the insertion of the above-mentioned direction, the Master declined to strike it out. On June 11, 1912, the defendants applied to a Divisional Court, asking that the order might be drawn up omitting therefrom the said direction. On the hearing of this application on June 11, the Divisional Court directed that, if no appeal should be brought within a week from that date, the money standing to the credit of the action in the county court should be paid out to the plaintiff or his solicitor, this order to be without prejudice to the plaintiff's right to contend that the time for appealing had already expired. On June 15 the defendants gave notice of appeal from the order of the Divisional Court, asking that that order so far as it affirmed the judgment of the county court judge should be set aside, and that judgment should be entered for the defendants, or in the alternative for a new trial. The appeal having been entered, an application was made to the Court of Appeal for an adjournment of the hearing. On that application the plaintiff's counsel contended that the notice of appeal from the order of the Divisional Court was, and the defendants' counsel contended that it was not, given out of time. Ultimately by consent an order was made that the balance of the money in Court should be paid out to the plaintiff, and that the hearing of the appeal should be adjourned, the defendants undertaking to move to extend the time for appealing. The defendants thereupon gave notice of application that, if, as contended by the plaintiff, the time limited by the Rules of the Supreme Court expired before the service of the notice of appeal, the defendants might, nevertheless, be at liberty to appeal from so much of the order of the Divisional Court of June 11, 1912, as directed that the judgment of the county court judge should be affirmed, and asking that his judgment should be set aside, and judgment in the action entered for the defendants, or in the alternative for a new trial.

Langdon, K.C. (*T. B. Leigh* with him), for the defendants. The defendants contend that the notice of appeal in this case was given in time. The appeal here was from a final order in the matter of an action, and therefore, under Order LVIII., r. 15,

the time within which an appeal might be brought was three months. If this contention is wrong, and the appeal should therefore have been brought within fourteen days, it is submitted that under the circumstances the Court should extend the time for appealing.

F. Newbolt, for the plaintiff. By s. 100 of the Judicature Act, 1873, the term "action" means "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court." The definitions given in s. 100 apply also to the Rules of the Supreme Court: Order LXXI., r. 1. A county court action is not commenced by writ, nor "in such other manner as may be prescribed by rules of Court" within the meaning of the Judicature Act, 1873, s. 100, because the words "rules of Court" in that section mean rules made under the Judicature Acts to govern the procedure in the Supreme Court (see Judicature Act, 1875, s. 17), and do not include the County Court Rules.

Assuming that the appeal is out of time, there is no sufficient ground shewn for extending the time for appealing.

BUCKLEY L.J. There was in this case a proceeding in the county court commenced by a plaint in accordance with Order v., r. 1, of the County Court Rules, 1903 and 1904, which provides that "all proceedings authorized to be commenced in a county court by or under the Act shall, except when otherwise provided by the Act or these rules, be commenced by the entry of a plaint, and shall be called actions." The proceeding thus commenced, which is by the rule to be called an "action," came to trial in the county court, and the county court judge gave judgment for the plaintiff for the sum of 97*l.* 3*s.* The defendants appealed to the Divisional Court, who on May 1, 1912, gave judgment, dismissing the appeal. Notice of appeal from their judgment was given on June 15, and consequently within three months from the day on which the judgment of the Divisional Court was pronounced. The question mainly argued before us was whether that notice of appeal was given in time. In the interval between the judgment in the Divisional Court and the giving of the notice of appeal certain steps had been

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taken. On May 7 a letter was written by the defendants' solicitor to the plaintiff's solicitor, requesting to have a copy of the order of the Divisional Court as drawn up. The defendants' solicitor, not getting an answer to this letter, wrote again to the plaintiff's solicitor, repeating that request. A copy of the order was then sent. An application with regard to the form of the order was made to a Divisional Court on June 11, and an order was made on that application; and thereupon the notice of appeal was given upon June 15. I do not dwell further on these dates. The question with which I shall deal is whether in this case the time for appealing under Order LVIII., r. 15, was or was not three months. That rule provides that "Subject and without prejudice to the power of the Court of Appeal under Order LXIV., rule 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of three months." It is plain, I think, that the order of the Divisional Court was not an interlocutory order. It was a final order dismissing an appeal from a final judgment of the county court. I have therefore to consider whether it was a final order made in a "matter not being an action." If it was a final order made in an action, then the time for appealing was three months, and this appeal was in time. The question which emerges is whether a county court action, being a litigation in which there is a plaintiff and a defendant, and which is called an "action" in the County Court Rules, is or is not an "action" within the meaning of Order LVIII., r. 15. The term "action" is defined in s. 100 of the Judicature Act, 1873, as follows: "'Action' shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court, and shall not include a criminal proceeding by the Crown." An action commenced in the county court is a civil proceeding, but it is not commenced by a writ. A proceeding need not, however, be commenced by writ for the purposes of the definition, if it is a civil proceeding commenced "in such other manner as may be prescribed by rules of Court." The county

court action was a civil proceeding so commenced, if those words mean or include "in such other manner as may be prescribed by rules of the Court in which the proceeding is initiated." That appears to me to be prima facie the meaning of the words. It was argued that the words "rules of Court" in that definition mean "rules of the Supreme Court," and not "rules of the Court in which the proceeding is initiated." I do not think that is so. In my opinion it was intended to include in the term "action" any civil proceeding in which there is a plaintiff, who sues, and a defendant, who is sued, in respect of some cause of action, as contrasted with proceedings, such as statutory proceedings, which are embraced in the word "matter." I have not found much in the Judicature Acts and Rules which assists me to a conclusion in this matter, but some assistance may, I think, be found in s. 126 of the County Courts Act, 1888, which gives power to the High Court or a judge thereof "to order the removal into the High Court, by writ of certiorari or otherwise, of any action or matter commenced in the Court under the provisions of this Act, if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs, giving security, or otherwise as the High Court or a judge thereof shall think fit to impose." That section speaks of an "action" commenced in the county court being removed into the High Court, and that "action" being tried in the High Court. Upon such removal, it becomes an action in the High Court, and none the less so because it was commenced by plaint in the county court. I think that within the meaning of Order LVIII., r. 15, the order of the Divisional Court was a final order, refusing, as it did, to disturb a final judgment of the county court, and that it was a final order in an action and not in a matter other than an action. In my opinion, therefore, the appeal was brought in time. If I had arrived at the opposite conclusion, I should have been disposed to grant the application for an extension of time, but, inasmuch as, upon the view which I take, the application was unnecessary, the application for extension of time must be dismissed.

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KENNEDY L.J. I agree. I think that this is a difficult point, but on the whole I concur in preferring the view which has been stated by my brother Buckley. Prima facie I should say that the word "action" in the phrase "not being an action" in Order LVIII., r. 15, would seem to be used in its natural meaning, as referring to any proceeding in the nature of a litigation between a plaintiff and a defendant. It was urged by the plaintiff's counsel with much force that we are not at liberty to give that word its general meaning, because the word "action" in Order LVIII., r. 15, must mean an action as defined by s. 100 of the Judicature Act, 1873, and such as is contemplated by Order I., r. 1, of the Rules of the Supreme Court, and an action in a county court is not a civil proceeding commenced by writ or "in such other manner as may be prescribed by rules of Court," the rules there meant being the rules governing the procedure in the High Court. We have not been referred to any other provisions of the Act which give much assistance in deciding the question whether the words "rules of Court" in Order LVIII., r. 15, mean rules governing the procedure in the High Court, with the result that a proceeding, to be an action within the meaning of r. 15, must have been commenced by a writ or in some other manner prescribed by these Rules, or whether the words "rules of Court" should be read in the wider sense of rules of any Court in which the proceeding is initiated; but I think that s. 126 of the County Courts Act, 1888, rather favours the conclusion that we may take the larger view. Possibly that conclusion may be somewhat aided by an observation of Cotton L.J. in *In re Fawsitt* (1), where the question was whether a proceeding commenced by originating summons was an action within the meaning of s. 100 of the Judicature Act, 1873. He there said, after referring to s. 100 of the Judicature Act, 1873, and to Order I., r. 1, "I do not understand that"—i.e., Order I., r. 1—"as saying that no proceedings but what are mentioned in that rule are to be called actions." In this case there was a civil proceeding in the county court which was, according to the ordinary understanding of language, not merely a matter, but a litigation between a plaintiff and defendants in the nature of an action. On the whole

(1) (1885) 30 Ch. D. 231, 233.

it seems to me that the wider view of the meaning of the words "rules of Court" in Order LVIII., r. 15, is preferable. If we had come to the opposite conclusion, I should have thought that the application for an extension of the time for appealing might under the circumstances properly be granted, but, after the discussion that has taken place, I think it is right that we should pronounce an opinion one way or the other on the point that has been raised as to the construction of this rule.

Solicitor for plaintiff: *H. Clemence.*

Solicitors for defendants: *Hopwood & Sons, for C. M. Beaumont, Manchester.*

E. L.

[IN THE COURT OF APPEAL.]

RELIANCE MARINE INSURANCE COMPANY *v.* DUDER.

Insurance (Marine)—Re-insurance Policy—Construction—Intention of Assured—Right of Assured to recover—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 26, *sub-s.* 3.

By three policies of insurance dated respectively May 6, May 11, and August 4, 1910, the plaintiffs insured the ship *Kynance.* The first two policies were for 500*l.* each and covered the vessel from Newcastle, New South Wales, to port or ports on the west coast of South America. The vessel was valued at 12,000*l.* and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage. The third policy, for 1000*l.*, covered the vessel from Valparaiso and/or port or ports on the west coast of South America to the United Kingdom or Continent or the United States. The vessel was valued at 10,000*l.* Risk to commence from expiration of previous policy.

On August 9, 1910, the plaintiffs re-insured the vessel with the defendant at and from Valparaiso and/or any port or ports on the west coast of South America to the United Kingdom, Continent, or United States. The ship was valued as in original policy. The policy was stated to be a re-insurance "subject to the same terms clauses and conditions as the original policy or policies and to pay as may be paid thereon." The charterparty under which the vessel made her voyage with a cargo from Newcastle, New South Wales, to the west coast provided that she should discharge at Valparaiso, or if ordered by the charterers' agents after her arrival there should discharge at any safe port on the west

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coast not north of P., and by arrangement between charterers and owners she did not discharge all her cargo at Valparaiso, but proceeded towards T., a west coast port not north of P., where she was to load a cargo under a fresh charterparty for a voyage to a European port. On her voyage from Valparaiso to T. she became a total loss. The plaintiffs having paid the owners for a loss under the first two policies sued the defendant on the policy of re-insurance. The defendant contended that the plaintiffs did not intend by the re-insurance to cover any risk except that under the third policy and adduced in support of that contention evidence of the instructions given by the plaintiffs to their brokers (but uncommunicated to the defendant) on effecting the re-insurance:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J., Buckley L.J. doubting), that the re-insurance policy covered the plaintiffs' risk under "original policies," and the natural meaning of the contract could not be narrowed as applying to one only out of the three original policies by evidence of intention on the part of the plaintiffs, uncommunicated to the defendant, to protect themselves only in respect of that single policy.

Decision of Bray J. affirmed.

Lower Rhine and Würtemberg Insurance Association v. *Sedgwick* [1899] 1 Q. B. 179, distinguished.

The meaning of s. 26, sub-s. 3, of the Marine Insurance Act, 1906, considered.

APPEAL from a decision of Bray J. in an action in the Commercial Court.

The plaintiffs sued the defendant upon a policy of re-insurance. The policy was dated August 9, 1910, and was expressed to be for 500*l.* upon the vessel *Kynance*, valued as in the original policy, against the risks of total and/or constructive total loss only, subject to the same terms, clauses, and conditions as the original policy or policies and to pay as may be paid thereon. The voyage insured was "at and from Valparaiso and/or any port or ports, place or places on the west coast of South America" to any port or ports, place or places in the United Kingdom and/or on the Continent of Europe between and including Bordeaux and Hamburg or held covered or in the United States of America.

The plaintiffs alleged that on July 29 the *Kynance* while on the insured voyage from Valparaiso to Tocopilla, whence she was to sail to the United Kingdom, was totally lost by perils insured against, namely, perils of the sea. Previously to August 9, 1910, the plaintiffs had insured the *Kynance* under three policies dated respectively May 6, May 11, and August 4, 1910. Of these

policies the first two, for 500*l.* each, covered the vessel from Newcastle, New South Wales, to port or ports, place or places, in any order or rotation on the west coast of South America. The vessel was valued at 12,000*l.*, and the risk was to continue until thirty days after arrival at final port of discharge or until sailing on next voyage, whichever might first occur. One of those two policies stated: "Cargo to be screened coal or held covered." The third policy, dated August 4, 1910, was for 1000*l.* and covered the vessel "at and from Valparaiso and/or port or ports and/or place or places in any order or rotation on the west coast. of South America to the United Kingdom or Continent, or the United States." The vessel was valued at 10,000*l.* This policy also provided: "In the event of total and/or constructive loss underwriters' subscriptions to be limited to 50 p. c. of their lines Warranted nitrate or held covered at a premium to be arranged Risk to commence from expiration of previous policy." The instructions given by the plaintiffs to their brokers to effect the policy of re-insurance were for a voyage "at and from Valparaiso and/or west coast of South America or held covered to United Kingdom, and/or Continent or to United States of America, or held covered . . . . warranted nitrate or held covered. Valuation clause. Hull &c. valued 10,000*l.* or v. o. p."

The charterparty under which the *Kynance* made her voyage with a cargo of coal from Newcastle, New South Wales, to the west coast of South America provided that she should discharge at Valparaiso, or, if ordered by the charterers' agents, after her arrival there, should discharge at any safe port on the west coast not north of Pisagua. By arrangement between the charterers and owners, she did not discharge all her coal at Valparaiso, but proceeded with 800 or 900 tons on board towards Tocopilla, a west coast port not north of Pisagua, where she was to load a cargo of nitrate under a second charterparty for a European port. Between Valparaiso and Tocopilla she was stranded and became a total loss. The plaintiffs having paid the owners for a loss under the first two policies sued the defendant on the policy of re-insurance. The defendant contended that the general words of the policy must be limited by the intention of the assured, and that the plaintiffs did not intend by the re-insurance to cover any risk

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except that under the third policy; and they having been held liable to pay, and having paid under the two earlier policies only, could not recover on the re-insurance policy.

Bray J. gave judgment for the plaintiffs. He said that he was unable to find that the intention of the plaintiffs was to cover only their liability under the third policy. It might be that they expected the liability to arise under the third policy, but it was not their intention to cover that liability only.

Against that decision the defendant appealed.

J. R. Atkin, K.C., and *D. C. Leck*, for the appellant. In the first two policies in this case the ship is valued at 12,000*l.* and the cargo is described as coal. In the third policy the valuation is 10,000*l.* and the cargo nitrate. The rule in these cases is laid down in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 26, sub-s. 3: "Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered." The same rule prevailed before the Act: see the judgment of Brett J. in *Allison* v. *Bristol Marine Insurance Co.* (1) *Lower Rhine and Würtemberg Insurance Association* v. *Sedgwick* (2) shews that a difference in the valuation of a ship in two policies is a strong reason against inferring an intention that a re-insurance policy should cover both. In this case the parties clearly intended that the re-insurance policy should apply only to the third policy for the return voyage which had not commenced when the ship was lost.

Bailhache, K.C., and *F. D. Mackinnon*, for the respondents. No intention can be shewn on the part of the respondents to limit the risks covered by the re-insurance policy to the risk under the third policy of August 4, although it may be that they anticipated that any claim against them in respect of the voyage of the *Kynance* from Valparaiso to Tocopilla would fall on them under the third policy.

This case is not covered by the decision of the Court of Appeal in *Lower Rhine and Würtemberg Insurance Association* v. *Sedgwick* (2), but it comes within the propositions of law upon

(1) (1876) 1 App. Cas. 209, 216 (2) [1899] 1 Q. B. 179.

which the decision of Kennedy J. rested in the same case in the Court below. (1) His decision was not reversed upon those propositions of law, but upon the finding by the Court of Appeal that the particular interest insured was defined by the re-insurance policy in that case.

The facts in this case are different. At the time of the re-insurance the respondents were at risk under the three policies. All that can be said is that they expected to be liable under the third policy, whereas in fact they were held liable under the first two policies. That cannot make any difference.

The Marine Insurance Act, 1906, s. 26, sub-s. 3, has no bearing on this case. The policy does not designate the subject-matter insured "in general terms" but in very specific terms. The subject-matter insured is the *Kynance*. The insurable interest in the *Kynance* is another thing, and so is the risk. Sub-s. 3 only applies where the subject-matter is defined "in general terms."

[KENNEDY L.J. Collins L.J. in *Lower Rhine and Würtemberg Insurance Association* v. *Sedgwick* (2) says: "The question here is whether, looking at the plain words of the policy, taken in conjunction with the surrounding facts, the subject-matter of the contract was not risks already undertaken by the assured under existing policies capable of being described."]

Sub-s. 3 of s. 26 only applies to cases where the particular interest assured is not specified at the time of taking out the policy, such as *Irving* v. *Richardson* (3) and *Scott* v. *Globe Marine Insurance Co.* (4) See also *Allison* v. *Bristol Marine Insurance Co.* (5); *Stephens* v. *Australasian Insurance Co.* (6)

[KENNEDY L.J. referred to *Royal Exchange Assurance* v. *McSwiney*. (7)]

Here the policy of re-insurance by its words aptly covers the loss which has happened. The *Kynance* was lost on a voyage marked out by the policy of re-insurance. The respondents shew that they had an insurable interest under the first two policies, and the appellant, the re-insurer, declines to pay because

(1) [1898] 1 Q. B. 739.
(2) [1899] 1 Q. B. 179, 189.
(3) (1831) 2 B. & Ad. 193.
(4) (1896) 1 Com. Cas. 370.
(5) 1 App. Cas. 216.
(6) (1872) L. R. 8 C. P. 18.
(7) (1850) 14 Q. B. 646.

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he alleges that the respondents' insurable interest arose under the first two policies, whereas they expected it to arise under the third policy. He is not entitled to say that. If the specific interest does not exist at the time of the re-insurance the assured cannot recover; but that is not this case.

Unless this case is concluded by the decision in *Lower Rhine and Würtemberg Insurance Co.* v. *Sedgwick* (1) the respondents are entitled to succeed. That decision was based upon grounds which do not affect this case.

In *Denoon* v. *Home and Colonial Assurance Co.* (2) Willes J. in the course of delivering the judgment of the Court said: "In this state of facts, and upon the construction of the policy in question, we adopt the view of the assured, that the freight of merchandise only was assured, according to his intention declared to his agent, and upon which the valuation took place; which intention, however, not being communicated to the underwriters, could not of itself have altered the construction of the policy whatever effect it may have had to shew a mistake on both sides as to the subject-matter of the valuation, and so to open the policy."

Leck in reply. In *Lower Rhine and Würtemberg Insurance Association* v. *Sedgwick* (3) Collins L.J. said: "This . . . . is the essence of the contract. Its purpose is to cover in whole or in part the risk actually undertaken on 'an original' policy." Here the risks insured against are so distinct that it is necessary to ascertain which was intended to be re-insured.

Cur. adv. vult.

May 18. COZENS-HARDY M.R. I agree with the judgment which Kennedy L.J. will read.

KENNEDY L.J. stated the facts, and continued: The question to be decided in the present action arises in respect of a re-insurance policy which was effected with the defendant, an underwriter, by the plaintiffs on August 9, 1910, and, therefore, after they had executed all the three policies of May 6

(1) [1899] 1 Q. B. 179, 189.
(2) (1872) L. R. 7 C. P. 341, at p. 350.
(3) [1899] 1 Q. B. at p. 190.

and 11 and August 4, and during the subsistence of those original policies. The plaintiffs sued the defendant in the present action upon this re-insurance policy in order to recoup themselves for the amount of the total loss which they have been held liable to pay and have paid to the owners of the *Kynance* under the original policies of May 6 and 11. [His Lordship then stated the terms of the re-insurance policy, and continued:] It was not argued at the trial, as Bray J. states in his judgment, and I did not understand the defendant's counsel to argue before us, that the loss in respect of which the plaintiffs have paid under the policies of May 6 and 11 did not fall within the words of the re-insurance policy, and I agree with the learned judge in thinking that they could not successfully have so argued. The language of this re-insurance policy is both sufficient and apt to constitute a contract between the plaintiffs, the Reliance Company, and the defendant, whereunder the plaintiffs, having paid in respect of the total loss of the *Kynance* upon the two original policies of May 6 and 11, became therefore entitled to be indemnified by the defendant in respect of such payments. In other words the policy of re-insurance, according to the natural meaning of its terms, covers the plaintiffs' risk of having to pay for the loss of the *Kynance* as and when in fact that loss occurred under any original policy or policies or at all events any original policy or policies existing at the time of the re-insurance under which that risk was insured by the plaintiffs: see *Lower Rhine and Würtemberg Insurance Association* v. *Sedgwick* (1); and each of the policies of May 6 and 11 was such an original policy.

It is of course immaterial, in regard to the liability of the defendant, as a re-insurer, to indemnify the plaintiffs in respect of a loss to which both the original policies of May 6 and 11 and the re-insurance policy extend, that the re-insurance policy would also have protected the original insurer in respect of a loss of the *Kynance* at a further stage, i.e., on the intended homeward voyage in regard to which the plaintiffs could have been liable to her owners only under the third policy of August 4. The applicability of a re-insurance policy in no way depends upon the period

(1) [1899] 1 Q. B. 179.

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of risk which it covers being conterminous with the risk in the original policy. So far there is not, I think, any difference between the parties. But the defendant, whilst admitting that the plaintiffs both at the time of the re-insurance and at the time of the loss of the *Kynance* had an insurable interest arising from their liability to the owners of the *Kynance* under the original policies of May 6 and 11, and not disputing that that risk is a risk which apparently comes within the terms of the re-insurance policy, and that the plaintiffs have in fact been held legally liable to pay under those original policies, resists the plaintiffs' claim because, as he contends, and as he contended before Bray J., that the general words must be limited by the intention of the assured, and the case shewed that the plaintiffs did not intend to cover by the re-insurance any risk except the risk under the third policy —the policy of August 4—and it is not upon that policy, but only upon the two earlier policies of May 6 and 11, that the plaintiffs have been held liable to pay for the loss of the *Kynance*. He has taken upon himself the burden of proving, not merely that the plaintiffs in re-insuring intended to cover their risk on the third policy, but intended to exclude their liability under the two earlier existing policies.

I am of opinion that this contention of the defendant fails both upon the facts and in point of law. Such an intention as the defendant imputes to the plaintiffs is, to say the least, improbable. It is difficult to imagine why the plaintiffs, as business men, having risks subsisting under all the three policies of insurance, should, when subsequently taking out through their brokers a policy of re-insurance in terms sufficient and apt to cover their risk on the *Kynance* during her stay on the west coast under all the three policies as well as during her intended further voyage homeward under the third policy, have intended to limit the protection of re-insurance to the risk under the third policy and to exclude the risks under the other two. It is, however, unnecessary to dwell upon this antecedent improbability. The defendant at the trial endeavoured to make out his case by an inference of intention which he invited the learned judge to draw from certain entries in the plaintiffs' books, from written communications passing between the plaintiffs and their insurance brokers and

between those brokers and their London agents, and also by oral evidence of a sort of constructive notice of the alleged intention given in conversation between those agents and the defendant. The learned judge, who had this written and oral evidence before him, has held that upon the facts the defendant wholly failed to prove his case. In the course of a considered judgment, after carefully reviewing the evidence, Bray J. stated his conclusion in the following terms :—

"I am unable to find that the intention of the plaintiffs was to cover only their liability under the third policy. It might be true to say that they expected the liability to arise under the third policy, but I find it is not true that their intention was to cover that liability only."

As I see no reason for differing from my brother Bray in regard to this finding of fact, it is not necessary for my judgment on this appeal to consider the law. But, as it was much discussed in the course of the argument in this Court, I think that I ought, shortly, to give reasons for my view that the basis of the defendant's contention is unsound and, the terms of the written contract between the parties being what they are, that the evidence adduced by the defendant was not legally admissible.

It is, I conceive, a fundamental principle of our law, that, where you have a contract which has a plain natural meaning, and which is not impeached upon the ground of common mistake or upon the ground of fraud and misrepresentation, it is not permissible to alter its effect according to the intention of one of the two contracting parties, or to adduce evidence in order to shew such an intention. If A. and B. enter into a written contract it is immaterial to consider what either of them intended to effect. The only question is, What have they said by their contract?

But it is just the opposite of this which the defendant, in resisting the plaintiffs' claim, has tried to do. We have here a re-insurance policy covering the insurer's risk under "original policies" ("subject to the same terms clauses and conditions as the original policy or policies and to pay as may be paid thereon") insuring the *Kynance* at the time and the place of her loss; and the defendant, the re-insurer, has attempted to narrow the natural

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and prima facie meaning of the contract contained in the re-insurance policy to one out of three of the original policies which existed at the time of the re-insurance, and to each of which the contract of re-insurance is, in regard to the safety of the *Kynance* whilst on the west coast, equally applicable, by proof of an intention on the part of the plaintiffs, uncommunicated to the re-insurer, to protect themselves only in respect of that single policy. Such a proceeding appears to me unjustifiable in point of law.

Willes J. in *Denoon* v. *Home and Colonial Assurance Co.* (1), referring to the intention of the assured as to insuring the freight upon merchandise only, says "which intention, however, not being communicated to the underwriters could not of itself have altered the construction of the policy whatever effect it might have had to shew a mistake on both sides as to the subject-matter of the valuation, and so to open the policy."

When the assured, whether in an original policy or in a re-insurance policy, has proved his interest at the time of the loss, the only other questions in the absence of some special provisions in the policy, relevant to the question of the insurer's liability, are: Was the subject-matter a subject-matter covered by the terms of the contract appearing in the policy? and, Was the risk occasioning the loss of that subject-matter a risk included in the terms of the contract appearing in the policy?

But then, says the defendant, "I rely upon s. 26, sub-s. 3, of the Marine Insurance Act, 1906." That enactment runs thus: "Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered."

I hope that I shall not be judged lacking in due respect either to the Legislature or to the eminent judicial authority (Lord Esher, then Brett J., in *Allison* v. *Bristol Marine Insurance Co.* (2)) whose language has been in this sub-section imported into the statute, if I venture to say that I think, as I understand Scrutton J. to think (see *S.S. Kynance Co.* v. *Young* (3)), in agreement with the learned editors of the last edition of

(1) L. R. 7 C. P. at p. 350. (2) 1 App. Cas. at p. 216.
(3) (1911) 16 Com. Cas. 123, at p. 131.

Arnould on Marine Insurance, vol. i., pp. 327, 328, that this sub-section might have been less obscurely worded. Possibly, as those learned editors suggest, a question may some day arise under it in regard to opening a valued policy in cases where the designation of the subject-matter in the policy is larger than the insurable interest of the assured, as the valuation was opened by Lord Ellenborough in *Forbes* v. *Aspinall* (1), and by Willes J. in *Denoon* v. *Home and Colonial Assurance Co.* (2) But, be this as it may, I do not think that this sub-section can rightly be interpreted to mean that an insurer is thereby entitled to exclude the assured from the benefit of the insurance of any of the risks which are within the terms expressed in the written policy, and which have been, presumably, considered by the insurer in fixing his premium, by shewing that, at the time when the insurance was effected, the assured "intended" in his own mind to cover only some of them. On the contrary, I think that, if this sub-section is read, as it ought to be, in connection with the rest of s. 26, the purpose of which, as appears by the marginal note, is to deal with "Designation of subject-matter," the principal object of the sub-section is to prevent an assured who at the time of a loss within the policy has only a limited interest in the subject-matter which is designated in the policy in general terms —such e.g., as "cargo" or "freight"—from being prejudiced by such generality of designation, provided that the designation is not inappropriate, as, e.g., "rice" would be, if intended to cover an interest in profits which might arise collaterally from a contract relating to the rice : see per Blackburn J. in *Anderson* v. *Morice* (3) and *McSwiney* v. *Royal Exchange.* (4) Having regard to the words "interest intended by the assured to be covered," I think that those who introduced the sub-section into the Act may also have had in view the one class of case in relation to marine insurance in which the "intention" of one of the two parties to the contract—i.e., the assured—is properly (I say "properly" because it is required by the very terms of the contract) matter of inquiry in regard to rights under the contract. According to the common form of policy (which appears in the re-insurance

(1) (1811) 13 East, 323.
(2) L. R. 7 C. P. 351.
(3) (1875) L. R. 10 C. P. 609, at p. 621.
(4) (1849) 14 Q. B. 634.

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policy which we are considering in this case) the insurance is effected by the insurance brokers "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does may or shall appertain in part or in all." The persons for whose benefit the policy was intended to enure have therefore to be ascertained. It is expressly provided by s. 14 of this Act that persons, such, e.g., as mortgagee or consignee, having only themselves a limited interest, may insure for and on behalf of other persons interested, as well as for their own benefit, and may recover accordingly upon the policy; although, of course, as laid down by Bowen L.J. in *Castellain* v. *Preston* (1), the plaintiff in such a case can keep for himself only so much of the amount recovered from the insurer as will be due in respect of his own limited interest. Even in such circumstances the claim to inquire into the intention of those who contract with the underwriter—not appearing in the policy and not communicated to him—has been criticized in a recent insurance case in the House of Lords. In *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (2) Lord Atkinson made the following remarks: "The underwriter, it would seem, was held to have insured those whom the persons who dealt with him intended should be insured, though that intention was never communicated to him. I doubt very much whether that doctrine can long survive the decision of your Lordships' House in *Keighley, Maxsted & Co.* v. *Durant* (3), or whether the rule of construction thus adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of all the law of contract, namely, that there must always be the consent ad idem of the two contracting minds to make a valid contract." I do not think that s. 26, sub-s. 3, assists the defendant in the present case.

The defendant appeared to some extent to seek to support his argument by a reference to the decision of the Court of Appeal in the case of *Lower Rhine and Würtemberg Insurance*

(1) (1883) 11 Q. B. D. 380, at pp. 398, 399.

(2) [1906] A. C. 336, at p. 343.

(3) [1901] A. C. 240.

Association v. *Sedgwick*. (1) I do not think that that case has really any bearing upon the question which we have to consider. So far as it goes, it is, when the grounds of the decision of the Court of Appeal are appreciated, rather adverse to the present defendant. The Court held, in the words of A. L. Smith L.J., that "prima facie a person who effects a re-insurance reinsures the liability he is under at the time when he effects the re-insurance, and not a liability he is not then under and may never thereafter come under"; and that the words of the "rubber clause" in that policy of re-insurance—"original policy or policies"—ought accordingly to be interpreted as referring to the two original policies which were in existence at the time of the re-insurance. The policy to which the defendant in that case was seeking to apply the re-insurance policy was a policy which had been effected upon the expiration of the two original policies which had existed at the time of the re-insurance and after the re-insurance policy had been effected. The Lord Justice proceeded to point out that he was not deciding that under no circumstances could a policy afterwards effected be covered by a re-insurance policy, but that, in face of the fact that there were at the time of the re-insurance two original policies to which it did apply and to which prima facie it must be held to apply, the words of the "rubber clause" were not sufficient to embrace a policy effected afterwards which in material terms differed from the two original policies. The reasoning of Rigby L.J. and Collins L.J. was substantially the same as that of A. L. Smith L.J. which I have cited. There is, as I have said, nothing in all this which assists the present defendant. The question of "intention" dehors the contract itself and existing only in the mind of the person who effected the re-insurance policy had not to be, and was not, considered at all. The Court of Appeal decided as it did, reversing the judgment which I had given in favour of the defendant, upon the grounds (1.) that it was the duty of the Court, as a matter of construction, to treat the re-insurance policy as prima facie applying, under the phrase "original policies," to the two policies already existent; (2.) that in a case, at any rate, where such original policies existed at the

(1) [1899] 1 Q. B. 179.

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time, a subsequent policy in essentially different terms ought not to be treated as covered by the re-insurance policy.

BUCKLEY L.J. I have had the advantage of reading and considering the judgment which Kennedy L.J. has delivered. I do not differ, but I still doubt. Whether the risk is a risk which comes within the words of the re-insurance policy upon its true construction is, I think, the question to be decided. As matter of construction of the words "original policy or policies" in the re-insurance policy the question is whether all or some and which of the three insurance policies is described by those words. Looking at the valuation given and the voyage described in the policy of August 4 as contrasted with those given and described in the policies of May, and looking at the voyage described in the re-insurance policy of August 9, it is I think a question of construction whether the policy of August 4 to the exclusion of those of May is not that which the re-insurance policy calls the "original policy or policies." To answer this question of construction no resort need be or ought to be had to intention. The documents alone and a proper regard to the surrounding circumstances are the only materials for the decision. I had elaborated this more fully in the judgment which I had written, but I think it unnecessary to deliver it.

Appeal dismissed.

Solicitors for appellant: *W. A. Crump & Son.*

Solicitors for respondents: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

G. A. S.

WIMBLE *v.* ROSENBERG.

1912
Dec. 9.

Sale of Goods—"Free on board"—Ship selected by Seller—Omission of Seller to give Buyer Notice of Shipment to enable him to insure—Whether Goods at Seller's Risk on Voyage—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 32, *sub-s.* 3.

By s. 32, sub-s. 3, of the Sale of Goods Act, 1893, "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit":—

Held, that the above sub-section does not apply to the ordinary contract for the sale of goods "f. o. b."

TRIAL of action before Bailhache J. without a jury.

By a contract dated June 27, 1912, the plaintiffs, as brokers for a foreign principal named De Winter, resident in Antwerp, sold to the defendants 200 bags of Arracan rice "f. o. b. Antwerp . . . . cash against bills of lading." It was conceded by both parties that the plaintiffs were under all the duties and obligations attaching to vendors, and for the purposes of the action might be treated as being the actual vendors. On August 9 the defendants sent the plaintiffs instructions to ship the rice to Odessa and to pay freight on their account, leaving it to the vendors to select the ship. The printed form of shipping instructions which the defendants ordinarily used contained a request to be informed by the vendors of the name of the ship by which it was proposed to ship the goods and of the date of proposed shipment, but they happened to have temporarily exhausted their supply of those forms and sent their instructions in writing, omitting the customary request above mentioned. The plaintiffs accordingly on the same date sent instructions to De Winter to ship the rice per first steamer to Odessa on account of the defendants and to pay the freight. The rice was shipped on board the steamship *Egyptian* on Saturday, August 24. The ship sailed on Sunday, August 25, and early on the following morning she stranded and became a total loss.

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The defendants did not receive from the plaintiffs any information of the shipment on the *Egyptian* until August 29, when the plaintiffs presented the bills of lading for payment. The defendants had not insured the rice as it was their practice not to insure until after the receipt of notice of the particular ship on which the goods were loaded. They accordingly refused to pay the price on the ground that the plaintiffs had failed to comply with the provisions of s. 32, sub-s. 3, of the Sale of Goods Act, 1893, and that the rice was consequently at the time of the loss at the plaintiffs' risk. The action was brought to recover the price of the rice and the amount of the freight paid by the plaintiffs on the defendants' account.

Leck, K.C., and *Theobald Mathew*, for the plaintiffs. This is not a case to which s. 32, sub-s. 3, of the Sale of Goods Act applies. The whole of that section deals with the case where goods are sent by the seller to the buyer, that is to say, are sent to their destination in pursuance of an obligation contained in the contract of sale. Here the goods were not so sent to the buyer by the terms of the contract, for to reach him they had to cross the sea, and the sale being "f. o. b." the delivery was complete as soon as the goods were handed over the ship's rail. Anything that the plaintiffs did in the way of forwarding the goods by sea was not done in pursuance of any contractual obligation.

George Wallace, K.C., and *Chaytor*, for the defendants. The words "sent by the seller to the buyer" in sub-s. 3 must have the same meaning that they have in sub-s. 1. The two sub-sections must be read together; and in sub-s. 1 they must include the case of a sale "f. o. b." It is agreed that the words "sent to the buyer" mean sent to their destination; but the goods reach their destination as soon as they are put on board ship, for the sub-section provides that delivery to a carrier shall be prima facie delivery to the buyer. (1) But even if that is not the

(1) By s. 32, sub-s. 1, of the Sale of Goods Act, 1893, "Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."

true meaning of the words, and if they are not satisfied immediately that the goods are delivered on board, still there is nothing necessarily inconsistent between a contract of sale "f. o. b." and an obligation to forward the goods by sea. The terms "f. o. b." may be merely a method of arriving at the price to be paid; and it is not true that all the incidents of an "f. o. b." contract necessarily attach wherever that expression is used. If sub-s. 3 does not apply to an "f. o. b." contract it is difficult to see what it does apply to. A sale on the terms of the price including cost freight and insurance is clearly not within it, for by the terms of the contract the vendor is to insure, and therefore it is excluded from the sub-section by the words "unless otherwise agreed."

Leck, *K.C.*, in reply. Sect. 32 has no application to a contract f. o. b. Sub-s. 3 is adopted from a Scotch rule under which the vendor was bound to give timeous notice of shipment, and which rule only applied to a form of contract which was neither "f. o. b." nor "c. i. f.," but said to the seller "send me the goods."

BAILHACHE J. This case assumes some importance, as I am told by counsel on both sides that it is the first in which s. 32, sub-s. 3, of the Sale of Goods Act, 1893, has come before an English Court for decision. That sub-section says that "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit." And sub-s. 1 of that section is in these terms: "Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer." Mr. Wallace says that, reading those two sub-sections together, I ought to come to the conclusion that sub-s. 3 refers to and covers every case of an "f. o. b." contract of sale. He

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says, though it is not necessary to put his case so high, that wherever there is an "f. o. b." contract of sale, it is now the duty of the vendor to give such notice to the buyer as may enable him to insure the goods during their sea transit. The words are "where goods are sent by the seller to the buyer by a route involving sea transit." Now there are three usual ways in which goods go forward by sea. There are three common forms of contract; one is "f. o. b.," the second is "c. i. f.," and the third is "ex ship." It cannot be contended that any notice could be required to be given by the vendor either in the case of an ex-ship form of contract or in that of a "c. i. f." form; and it is a little startling to me to be told that under an "f. o. b." form of contract goods are sent by sea by the vendor. What one generally understands by an f. o. b. contract is that the goods are not sent by sea by the vendor, but are delivered by him at the rail of the ship, and are then taken over by the shipowner nominated by the buyer, and conveyed by him across the sea. Mr. Leck agrees that sub-s. 3 must be read in the light of sub-s. 1, and that consequently it only applies to a case where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer; but he says that under an "f. o. b." contract the seller is never authorized or required to send the goods to the buyer, but performs his duty when he puts the goods on board the steamer. The case not being covered by authority, I must do the best I can to form my own unaided opinion as to what this sub-section really refers to, and I am free to confess that during the argument my mind has fluctuated a good deal about it. It is fairly clear that it cannot refer to the ordinary case of an "f. o. b." contract. Under such a contract the ship is designated by the buyer, and it cannot be that in such a case the vendor has to give the buyer notice to enable him to insure, for the buyer himself knows the ship by which he is going to send his goods before the vendor can possibly know it. And Mr. Leck says that the contract in the present case is an ordinary "f. o. b." contract. I was at first disposed to think that that was not the case. I was disposed to read the contract together with the shipping instructions, and to say that, although the sale was at an "f. o. b." price, the contract

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was one whereby the vendor undertook to send the goods by some ship to be selected by himself. If that were the true view of the contract I think that sub-s. 3 would have applied and covered this case. But Mr. Leck has convinced me that I must look to the actual contract by itself and disregard the shipping instructions. If I look to the actual contract alone it is a contract of the ordinary "f. o. b." kind, and I think Mr. Leck is probably right when he says that the vendors might have disregarded the shipping instructions and might have required the defendants to procure and provide their own shipping room. It may be said, and I feel the force of this very strongly, that if I do not apply sub-s. 3 to a contract of this kind, where shall I find in ordinary practical business the class of contract to which that sub-section applies? I feel the difficulty of that, but I do not think that that is of itself sufficient to entitle me to say that sub-s. 3 must apply to a case of this kind. Upon the whole, therefore, I come to the conclusion that the plaintiffs are right and are entitled to the money claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Waltons & Co.*

Solicitors for defendants: *Coward, Hawksley & Co.*

J. F. C.

1912
Nov. 25.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* HERION AND OTHERS.

Vagrancy Acts—Repeated Offences under Vagrancy Act, 1898 (61 & 62 *Vict.* c. 39), *s.* 1—*Whether punishable with Whipping under Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *ss.* 4, 5, 10.

By s. 1 of the Vagrancy Act, 1898, every male person who commits an offence of the kind therein specified "shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly":—

Held, that upon a second conviction under that section the offender may be dealt with as an "incorrigible rogue" under s. 10 of the Act of 1824, and, on being sent to the quarter sessions, may be ordered by them to be punished by whipping.

CASE referred to the Court of Criminal Appeal by the Home Secretary.

The prisoners, three young men, had severally been convicted at petty sessions a second time of the offence of unlawfully and persistently soliciting for immoral purposes contrary to the provisions of s. 1 of the Vagrancy Act, 1898.

By that section, "Every male person who—(*a*) knowingly lives wholly or in part on the earnings of prostitution; or (*b*) in any public place persistently solicits or importunes for immoral purposes, shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly." By s. 4 of the Vagrancy Act, 1824, persons convicted of the offences therein specified are to be deemed "rogues and vagabonds" and may be punished with three months' imprisonment with hard labour. By s. 5, "Every person committing any offence against this Act which shall subject him . . . . to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . . shall be deemed an incorrigible rogue," and upon conviction at petty sessions he may be committed to prison until the next quarter sessions. And by s. 10, "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter

sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order, and to order further, if they think fit, that such offender . . . . be punished by whipping."

The prisoners having been sent by the convicting magistrate to the London Quarter Sessions, the deputy chairman sentenced them each to nine months' hard labour and to receive twenty-five strokes with a birch rod. The prisoners petitioned the Home Secretary to remit the portion of the sentence which ordered them to be whipped. The Home Secretary, having regard to the fact that some doubt had been expressed as to whether the provisions of s. 1 of the Vagrancy Act, 1898, were a sufficient authority for dealing with a prisoner convicted a second time under that Act as an incorrigible rogue within the meaning of s. 5 of the Vagrancy Act, 1824, referred the matter to the Court.

Percival Clarke, for the prisoners. The Vagrancy Act, 1824, deals with three classes of offenders. In s. 3 it imposes in respect of certain minor offences therein specified a maximum punishment of one month's hard labour, the offenders against the section being termed "idle and disorderly persons." In s. 4 it deals with a more serious class of offences in respect of which it imposes a maximum punishment of three months' hard labour, the offenders being termed "rogues and vagabonds." And in s. 5 it is provided that a person who has twice been convicted of "any offence against this Act which shall subject him to be dealt with as a rogue and vagabond" shall be deemed an "incorrigible rogue," the punishment for an incorrigible rogue being provided by s. 10, by which the maximum term of imprisonment is raised to twelve months with hard labour, and the Court are further empowered to order a whipping in addition. Therefore being an incorrigible rogue is something different from being a rogue and vagabond and constitutes a higher degree of offence. Then by the Vagrancy Act, 1898, the offenders against that Act are to be deemed rogues and vagabonds within

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the meaning of the Act of 1824 and are to be dealt with accordingly. That means that they are to be treated as if they had committed an offence against s. 4, and are to suffer the punishment provided by that section, that is to say, imprisonment for not exceeding three months. There is no provision in the Act of 1898 for dealing with a person convicted a second time under that Act as an incorrigible rogue; nor is there anything in the Act of 1824 enabling the Court to do so, for s. 5 only applies to persons committing second offences against that Act. The later Act does not provide that the two Acts shall be read together as one Act.

Comyns Carr, for the prosecution, was not called on.

The judgment of the COURT (Lord Alverstone C.J., Darling and Avory JJ.) was delivered by

LORD ALVERSTONE C.J. There can be no doubt about this case. The appellants were respectively sentenced to nine months' imprisonment and to be whipped, and the appeals are against the latter portion of the sentences; though if Mr. Clarke is right in saying that they can only be punished under s. 4 of the Act of 1824 and not under s. 10 the sentence of nine months' imprisonment is as bad as that of the whipping. The Act of 1898 creates two new offences, and says that persons who commit them shall be deemed to be rogues and vagabonds under the earlier Act and shall be dealt with accordingly. It does not itself specify the punishment to be awarded, but leaves the offenders to be dealt with under the earlier Act. The effect of that is to add two new offences to s. 4, and it is to be observed offences much more serious in character than many of the original offences in that section. The statute says that persons committing the new offences shall be dealt with as rogues and vagabonds. Then how are rogues and vagabonds dealt with? Sect. 5 of the earlier Act provides that "Every person committing any offence against this Act which shall subject him . . . . to be dealt with as a rogue and vagabond" after a previous conviction for a similar offence shall be deemed an incorrigible rogue, who by s. 10 is to be punished as therein provided. It is true that s. 5 only deals with persons committing offences "against *this* Act," but in our opinion the

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new offences are to be read into s. 4 and treated as offences under that section, with the consequence that on a second conviction for such an offence the offender may be dealt with under s. 10. The appeals must be dismissed.

Appeals dismissed.

Solicitor for appellants: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

[COURT OF CRIMINAL APPEAL.]

1912

Dec. 20.

THE KING *v.* EDWARDS AND ANOTHER.

Criminal Law—Indictment—Joinder of several Charges against different Defendants—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 5.

Sect. 5 of the Larceny Act, 1861, which provides that "It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them," does not authorize the joinder in one indictment of a count for larceny against one defendant alone with a count for another larceny against the same defendant and another person jointly. Such an indictment is bad and may be quashed after verdict.

APPEAL to the Court of Criminal Appeal.

An indictment by the first count charged one Alfred Gilbert with having on October 22, 1912, stolen five sacks of wheat, the property of Messrs. E. & J. Fountain.

The second count charged the said Alfred Gilbert and Robert Brooks with having on October 29, 1912, stolen four sacks of wheat, the property of the said Messrs. E. & J. Fountain.

The third count charged the appellant Arthur Edwards and one Edward Ashby with having received the said four sacks of wheat knowing them to have been stolen.

The defendant Gilbert was the man in charge of a barge in which the wheat mentioned in the indictment was carried from

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Brentford to Uxbridge, and the defendant Brooks was his assistant who went with the horses on the towing path. Ashby was the owner of a wharf at Uxbridge, and Edwards was his manager. Owing to holes in the sacks in which it was being carried a quantity of the wheat escaped on to the floor of the barge, from which it was afterwards collected by Gilbert, put into other sacks, and deposited at Ashby's wharf with the connivance of Edwards. The trial took place at the Middlesex Quarter Sessions. Before the case was opened counsel for the defence took the objection that the indictment was bad on the ground that it charged Gilbert with one larceny in the first count and Gilbert and Brooks jointly with another larceny in the second count, and such a joinder was not authorized by s. 5 of the Larceny Act, 1861. The chairman overruled the objection. At the close of the case for the prosecution Ashby was discharged by the direction of the Court, and a verdict of not guilty was taken in the case of Brooks. Gilbert was found guilty of stealing the wheat, and Edwards of receiving it. Both the said defendants appealed.

Elliott, K.C., and *E. Fulton*, for Edwards. The indictment ought to be quashed. Sect. 5 of the Larceny Act, 1861, only allows the joinder of different charges of larceny against the same person. There is no precedent for charging one person with a larceny in one count, and in a second count charging another larceny against that person jointly with another person.

Cassel, for Gilbert, supported the motion to quash.

Purcell, for the Crown. Even if the indictment is bad the defendants' case is devoid of merits, and the Court ought to dismiss the appeals under the proviso in s. 4, sub-s. 1, of the Criminal Appeal Act, 1907.

The judgment of the COURT (Ridley, Phillimore, and Bankes JJ.) was delivered by

RIDLEY J. We think this indictment was bad. At common law a joinder in one indictment of charges of distinct offences against different defendants made the indictment bad. Sect. 5 of the Larceny Act, 1861, was intended to authorize, in the cases therein specified, the joinder of several charges against the same

defendant, not against different defendants. The words are "It shall be lawful to insert several counts in the same indictment against the same person." Here the indictment has joined a charge of larceny against Gilbert in one count with a charge of larceny against Brooks in another count. The latter count does not the less charge a different person from the one charged in the first count because it charges him jointly with that person. The indictment must therefore be quashed. We were asked by counsel for the prosecution, in the event of our holding that the indictment was bad, to apply the proviso at the end of s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and dismiss the appeals on the ground that there had been no substantial miscarriage of justice. It is true that there is a precedent for applying that proviso to a case in which the indictment is technically bad in *Rex* v. *Harris*. (1) But in that case the appellant had no merits at all, the only objection being that in an indictment for an attempt to steal the words "take and carry away" were omitted after the word "steal," whereas here we cannot say that the appellants did not suffer some degree of prejudice from the improper joinder of defendants.

Appeals allowed.

Solicitor for Edwards: *Percy Robinson.*
Solicitor for Gilbert: *Hanne & Sons.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) (1910) 5 Cr. App. R. 285.

J. F. C.

1912
Dec. 11, 12.

THE KING *v.* BAGGALLAY.

HURLOCK, APPELLANT *v.* SHINN, RESPONDENT.

THE KING *v.* HEDDERWICK.

MORRIS, APPELLANT *v.* ASHTON, RESPONDENT.

National Insurance—Employer—Failure to pay Contributions—Offence—Summary Conviction—National Insurance (Joint Committee) Regulations, 1912—*National Health Insurance (Collection of Contributions) Regulations*, 1912—*Validity—Certificate of Urgency—Provisional Regulations—Powers of Joint Committee and Insurance Commissioners—Rule-making Authority—Government Department—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *ss.* 4, 7, 65, 69, 83—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 37—*Rules Publication Act*, 1893 (56 & 57 *Vict. c.* 66), *ss.* 1, 2, 4.

By the National Health Insurance (Collection of Contributions) Regulations, 1912, made on May 22, 1912, the Joint Committee of the several bodies of Commissioners acting jointly with the Insurance Commissioners constituted under the National Insurance Act, 1911, certified under s. 2 of the Rules Publication Act, 1893, that on account of urgency the following Regulations were to come into operation immediately, and in pursuance of the powers conferred on them by the National Insurance Act, 1911, and the National Insurance (Joint Committee) Regulations, 1912, they made the said Regulations to come into operation forthwith as Provisional Regulations.

The National Insurance Act, 1911, came into force on July 15, 1912:—

Held, that, assuming the Joint Committee and the Insurance Commissioners were not a Government department, and consequently were not a rule-making authority as defined by the Rules Publication Act, 1893, and that they, therefore, had no power by certifying urgency to bring the Regulations into operation on May 22, 1912, the Regulations had been duly made under the powers conferred by ss. 7 and 65 of the Insurance Act, and clause 5 (*c*) of the National Insurance (Joint Committee) Regulations, 1912, and were as from the date when the Act came into force valid and enforceable Regulations.

Neither clause 5 (*c*) of the National Insurance (Joint Committee) Regulations, 1912, nor clause 6 (1.) (*a*) of the National Health (Collection of Contributions) Regulations, 1912, is ultra vires.

The failure of an employer to pay a contribution in respect of an employed contributor is under s. 69, sub-s. 2, of the Act an offence punishable on summary conviction, and a conviction is not bad because it orders the defendant both to pay a fine and to pay to the Insurance Commissioners a sum equal to the amount of the contributions which the defendant has failed to pay.

It is no defence to a charge of failing to pay contributions under the

Act that at the date of the failure to pay the benefits intended to be provided under the Act had not in fact been provided.

In each of seven successive weeks an employer failed to pay contributions in respect of the same employed contributor. After the expiration of the seven weeks, he was prosecuted and convicted under s. 69, sub-s. 2, for a separate offence in respect of each failure to pay:—

Held, that the defendant had been guilty of seven separate offences.

THE KING *v.* BAGGALLAY.

HURLOCK *v.* SHINN.

THESE two cases were heard together.

In *The King* v. *Bagallay* an order nisi had been obtained calling upon Mr. Baggallay, a metropolitan magistrate, to shew cause why a writ of certiorari should not issue to bring up and quash the conviction of William Hurlock for having failed on July 20, 1912, to pay a contribution which he was liable to pay under Part I. of the National Insurance Act, 1911, in respect of one Tinney, an employed contributor, contrary to the Act and the Regulations made thereunder (1), and whereby it was adjudged that the said Hurlock for his said offence should forfeit and pay the sum of 5*l.* and 5*l.* 5*s.* for costs, and whereby furthermore it was ordered in pursuance of the Act and Regulations that Hurlock should pay the sum of 7*d.*, the amount of the said contribution. The order nisi was obtained on the following grounds:—(1.) That the making, promulgation, and operation of the National Health Insurance (Collection of Contributions) Regulations, 1912, which formed the basis of the magistrate's decision, were not proved, and the Regulations were not put in or admitted in evidence, and if admissible in evidence were invalid and inoperative and were not statutory rules or made operative as provisional rules under or within the meaning of the Rules Publication Act, 1893. (2.) That Regulation 6 (1.) (*a*) was ultra vires the powers conferred by the National Insurance Act, 1911. (3.) That no contributor's card was ever applied for by, or issued to, Tinney within the meaning of the Regulations, and even if the card which was relied upon had been regularly issued the evidence

(1) The material sections of the Act of Parliament and the Regulations are printed at the end of this report.

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shewed that the contributor deposited it with the defendant for safe custody and the jurisdiction of the magistrate to convict of an offence on July 20 did not arise. (4.) That the charge laid in the information did not amount in law to any offence or complaint over which the magistrate had jurisdiction under the Summary Jurisdiction Act, 1879. (5.) That the combined effect of an adjudication by a conviction and orders for payment of money was not within the magistrate's jurisdiction under the Summary Jurisdiction Act, 1879. (6.) That the conviction in law disclosed no offence under the National Insurance Act, 1911.

An affidavit in answer to the order nisi was sworn by the magistrate, but it is unnecessary to set it out because subsequently to the granting of the order nisi the magistrate stated the facts in a case (*Hurlock* v. *Shinn*) for the opinion of the Court, an application for a case having been made to him on behalf of the defendant at the time of the conviction.

The material facts stated in the case of *Hurlock* v. *Shinn* were as follows:—

On August 20, 1912, at the Lambeth Police Court the appellant, William Hurlock, appeared to answer three informations preferred against him by the respondent, William Shinn, an inspector under the National Insurance Act, 1911. The first information charged that the appellant on July 20, at 60, Walworth Road, S.E., did fail to pay a contribution which he was liable to pay under Part I. of the Act in respect of an employed contributor, Reginald Reeve Tinney, contrary to Part I. of the Act and the Regulations made thereunder. The other two informations were in the same form and related to two other employed contributors named Brown and Hammond. By consent of the appellant's counsel the three informations were heard together.

The following facts were proved:—Tinney, Brown, and Hammond were on July 20, 1912, and at all material times employed by the appellant, and were employed contributors within the meaning of Part I. of the Act. Their wages were paid weekly, and one week's wages were paid by the appellant to each of the said persons on July 20 in respect of the week ending on that date. No contribution within the meaning of the Act

was paid by the appellant by affixing stamps to the cards of the said employed contributors in respect of the said week, and there was no evidence that such contribution was paid in any other manner. The three employed contributors were called as witnesses and were cross-examined, and it appeared that Tinney had before July 15, 1912, received, in an envelope addressed to him at 60, Walworth Road, an insurance card from an approved society within the meaning of the Act, namely, the National Amalgamated Union of Shop Assistants, of which union he was a member. During the week commencing July 15 he handed the card to a porter in the appellant's employment, with instructions to hand it in to the appellant's office for safe custody during its currency, and had not since applied for or received it back. Tinney had not applied to the said union for the issue of an insurance card, and when he received it he had not decided whether he would join an approved society or become a deposit contributor within the Act.

Similar facts were proved with regard to Brown and Hammond, the other two employed contributors.

A copy of the National Health Insurance (Collection of Contributions) Regulations, 1912, made under ss. 7 and 65 of the Act, purporting to be published by His Majesty's Stationery Office (a copy of which formed part of the case), was produced to the magistrate. No proof was given of the making or promulgation of these Regulations, but no objection was taken on behalf of the appellant to the absence of such proof. On behalf of the appellant it was proved that no regulations under s. 15 of the Act (other than the above Provisional Regulations) had up to August 20, 1912, been made by the Insurance Commissioners.

It was contended on behalf of the appellant (1.) that the offence created by s. 69 of the Act and the conviction and order therein contemplated were not by the Act directed to be prosecuted before justices or under the Summary Jurisdiction Acts upon information, and that therefore the magistrate had no jurisdiction to convict the appellant. (2.) That upon the reasonable construction of the Act the obligations created by ss. 1, 4, 8, 10, 14, 15, and 16 were concurrent conditions, and the delegation by the Act to the Insurance Commissioners of the power of making

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regulations for the purpose of settling the details for giving effect to the principles and objects of the Act by making regulations (1.) providing for payment of contributions and (2.) providing, prescribing, and regulating by and through insurance committees of inter alia medical and sanatorium benefits was intended to be exercised with full regard to the nature and object of the said concurrent conditions, and not to authorize Insurance Commissioners to make statutory rules for payment of contributions to operate from the date of the commencement of the Act without also making before the Act came into operation regulations for providing the benefits which on the operation of the Act were by s. 8 intended and declared to be conferred. (3.) That the making, promulgation, and operation of the National Health Insurance (Collection of Contributions) Regulations, 1912 (the above-mentioned Provisional Regulations), if any, were invalid and void as not being within the powers conferred by the Rules Publication Act, 1893, or the National Insurance Act, 1911. (4.) That regulation 6 of the above Regulations was not within the power conferred upon the rule-making authority by s. 4, sub-s. 1, and ss. 7 and 65 of the Act. (5.) That there was no legal obligation on the appellant to stamp the cards on or before August 20, 1912, or at all, because the cards were not cards within the meaning of the Regulations.

The magistrate convicted the appellant on each information and ordered him to pay a penalty of 5*l.* for each offence and 5*l.* 5*s.* costs, and to pay to the Insurance Commissioners in respect of each information the sum of 7*d.*, being the amount of the contribution which he had failed to pay.

The question for the opinion of the Court was whether on the above facts the magistrate came to a correct determination in point of law.

Sir John Simon, S.-G. (*Travers Humphreys* and *G. A. H. Branson* with him), shewed cause against the order nisi and represented the respondent on the case stated. The first three grounds on which the order nisi was obtained are not matters for certiorari, but they are also raised by the case, and it will be convenient to deal with the different contentions of the appellant in the order

in which they are stated in the case. The first point raised in the case, which is the same as the fourth ground in the order nisi, is that the magistrate had no jurisdiction to deal with the offence under the Summary Jurisdiction Acts. The answer to this contention is to be found in s. 69, sub-s. 2, of the Insurance Act, which in terms provides that an employer who fails to pay any contributions shall for each offence be liable "on summary conviction" to pay a fine and also to pay a sum equal to the amount of the contributions; and s. 51 of the Summary Jurisdiction Act, 1879, expressly applies the Summary Jurisdiction Acts to any future Act in which any fine is authorized to be recovered "on summary conviction." Similarly, the fifth point in the order nisi, that the payment of the fine and the recovery of the contribution cannot be included in one conviction, is answered by the express language of s. 69, sub-s. 2, of the Insurance Act, which provides that both liabilities attach to each offence.

The second point raised by the case is, in substance, that proceedings for enforcing the payment of contributions cannot be taken until arrangements have been made for providing the benefits intended to be conferred by the Act. There is no foundation for this suggestion. The combined effect of ss. 4 and 115 of the Act is that there is an unconditional obligation on employers to pay contributions from July 15, 1912, the date when the Act came into force, whereas s. 8, sub-s. 8, provides that medical benefits shall not be received during the first six months after the commencement of the Act, and by the same sub-section other benefits are postponed until a certain number of contributions have been paid.

The third point relates to the validity of the National Health Insurance (Collection of Contributions) Regulations, 1912, issued by the Joint Committee of the several bodies of Commissioners and the Insurance Commissioners jointly on May 22, 1912. Sect. 7 of the Act authorizes the Insurance Commissioners to make regulations providing for any matters incidental to the payment and collection of contributions payable under Part I. of the Act, and s. 65 confers a general power on the Insurance Commissioners to make regulations generally for carrying

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Part I. of the Act into effect, which are to have effect as if enacted in the Act. The Joint Committee of Commissioners is constituted under s. 83, sub-s. 2 of which empowers the Joint Committee to exercise and perform such powers and duties of the Commissioners as may be prescribed by regulations to be made by the Treasury. The National Insurance (Joint Committee) Regulations of February 21, 1912 (Statutory Rules and Orders, 1912, No. 175), by clause 5 (*c*) provide that for the purposes of the provisions of the Act relating to contributions the Joint Committee shall exercise jointly with the several bodies of Commissioners the power under s. 7 of the Act of making regulations for matters incidental to the payment and collection of contributions.

Prima facie, therefore, the National Health Insurance (Collection of Contributions) Regulations, 1912, were validly made under the powers conferred by the Act, and no steps having been taken to procure their annulment in the manner prescribed by s. 65, they would come into force at the date when the Act itself came into force. But it is said that they are invalid because they were issued as Provisional Regulations to come into operation forthwith on a certificate of urgency given by the Joint Committee and the Insurance Commissioners under s. 2 of the Rules Publication Act, 1893. The powers conferred by that Act may be exercised by a "rule-making authority," which by s. 4 "includes every authority authorised to make any statutory rules"; by the same section "'Statutory rules' means rules, regulations, or byelaws" made by certain named persons or bodies "or any other Government department." Those latter words are not used in any technical sense: see Board of Agriculture Act, 1889, ss. 4 and 11; and they include any public authority which has statutory power to make regulations. The Insurance Commissioners and the Joint Committee are a Government department within s. 4 of the Act of 1893, and by the combined effect of s. 115 of the Insurance Act and s. 37 of the Interpretation Act, 1889, they had power to make these Regulations before the Act itself came into operation. But even assuming that they had no power to make regulations which would come into force before the Act, at the date of these

proceedings the Act had come into force, and the Regulations having been validly made under the Act were in force at the date when the proceedings were instituted. The fact that they are called Provisional Regulations cannot invalidate them if they are otherwise valid, and the reference to the Rules Publication Act, 1893, and the certificate of urgency may be disregarded as surplusage.

The fourth contention is that Regulation 6 (1.) (*a*) is ultra vires. That deals with the times for the stamping of cards, and s. 7 of the Act in terms authorizes regulations for the payment of contributions by means of stamps affixed to cards. As to the last contention raised in the case, there was evidence which entitled the magistrate to find, as he did find, that the cards in question were insurance cards.

Jellicoe, in support of the rule and for the appellant. The appellant was convicted for having failed to pay "a contribution." The offence which is created by s. 69, sub-s. 2, is the failure to pay "any contributions." The non-payment of one contribution is not made an offence, and the section does not warrant the dealing with a number of different failures as separate offences. The conviction was also bad because it includes an order for the payment of a fine and for the payment of the amount of the contribution. The latter order is an order for the recovery of a civil debt, and although s. 69 says that the offender is to be liable on summary conviction to a fine, it does not authorize the application of the provisions of the Summary Jurisdiction Acts as to the recovery of civil debts to the payment of the sum equal to the amount of the contributions which the offender has failed to pay. As to the fifth contention in the case, which is the same point as is raised by the third ground in the order nisi, the facts found by the magistrate shew that Tinney, the employed contributor, had not applied to an approved society or the post office for a card as is required by regulation 4 (1.) (*a*). The card was deposited with the appellant merely for safe custody, and the obligation under regulation 6 (1.) (*a*) to stamp it never arose. Further, that regulation is ultra vires. Sect. 4 of the Act says that the contributions shall be paid "at weekly or other prescribed intervals." Regulation 6 (1.) (*a*) provides that the time

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for payment, where money payment is made by the employer, shall be before the money payment in respect of the period for which the contribution is payable. That is not a compliance with s. 4. Next, no contributions are payable until the benefits intended to be conferred by the Act are in operation. Sect. 1 provides that all insured persons "shall be entitled" to the benefits conferred by the Act; by s. 3 the funds for providing the benefits shall in part be derived from the contributions made by or on behalf of the insured persons. Sects. 8, 10, 14, and 15 deal with the benefits and the manner in which they are to be provided. The proper inference to be drawn from these provisions of the Act is that there was no liability on the appellant to make any contributions because at the date of the alleged offence none of the benefits of the Act could be obtained.

With regard to the question of the validity of the Regulations as a whole, it is no doubt true that the Act by ss. 7 and 65 confers certain powers on the Insurance Commissioners as to making regulations, but there is no power to make provisional regulations or to bring them into force before the date of the Act. Sect. 37 of the Interpretation Act, 1889, does not assist the Commissioners, for although that section does permit in certain cases rules or regulations to be made after the passing of an Act and before it comes into force, that power can only be exercised in the manner prescribed by the Rules Publication Act, 1893, and that is why these Regulations were issued under the Act of 1893. But the Act of 1893 can only be utilized by the bodies named therein "or any other Government department." Neither the Joint Committee nor the Insurance Commissioners are a Government department any more than the Ecclesiastical or Charity Commissioners are. The words must be read as meaning bodies ejusdem generis as those specified in s. 4 of the Act of 1893, which are all Government departments in the strict sense of the word, such as the Board of Trade and the Local Government Board.

[*Sir J. Simon, S.-G.*, referred to s. 112 of the Insurance Act.]

It is no answer to say that now that the Insurance Act is in force the Regulations are valid. They can only be valid if they were made under the Act, but the fact that they were issued as Provisional Regulations shews conclusively that they were not

made under the Insurance Act, but under the Act of 1893, and being provisional regulations they would only remain in force until other regulations were made in the prescribed manner, and that has never been done.

LORD ALVERSTONE C.J. said that the Court would hear the other cases before delivering judgment.

THE KING v. HEDDERWICK.

In this case an order nisi had been obtained directed to Mr. Hedderwick, a metropolitan magistrate, for a certiorari to quash two convictions of one Walter Slate for failure to pay contributions on July 20 and August 3, 1912, under the Act in respect of two employed contributors. The facts were similar to those in *The King* v. *Baggallay*, and the order nisi was obtained on the same grounds, with one exception, namely, a ground which was also raised in the fourth case, *Morris* v. *Ashton*. The case was not argued as it was agreed by counsel that the points raised would be covered by the decision in the other cases.

The same counsel appeared on both sides as in *The King* v. *Baggallay*.

MORRIS v. ASHTON.

Case stated by justices for the county of Hertford, being a Court of summary jurisdiction sitting at Buntingford under the Summary Jurisdiction Acts, 1857 and 1879.

The facts stated in the case were as follows: At the said Court an information was preferred by the respondent, Ashton, under the National Insurance Act, 1911, and the Regulations made thereunder, against the appellant, Morris, for that he on July 19, 1912, at Bury Farm, Buntingford, did fail to pay a contribution of 7*d*. for the week commencing July 15, 1912, in respect of Robert Hurry, an employed contributor, contrary to Part I. of the Act and the Regulations made thereunder.

At the same Court the respondent preferred against the appellant six similar informations under the Act and Regulations for that the appellant on July 26, August 2, 9, 16, 23, and 30, 1912, failed to pay similar contributions for the weeks

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commencing July 22, 29, August 5, 12, 19, and 26, 1912, respectively, which he was similarly liable to pay in respect of the said Hurry, and seven similar informations in respect of the dates aforesaid in respect of each of three other employed contributors, named Moule, Anderson, and Parker.

On the hearing of the informations the following facts were proved or admitted:—

At all material times Hurry, Moule, Anderson, and Parker were employed contributors, within the meaning of the Act, in the employ of the appellant, being paid by him weekly wages payable on Fridays.

On July 19, 1912, before payment of their wages, the said employed contributors produced to the appellant cards in the form prescribed in the National Health Insurance (Collection of Contributions) Regulations, 1912, but the appellant did not then or at any other time affix any stamps to the said cards or otherwise pay any contributions in respect of the said employed contributors.

The National Insurance (Joint Committee) Regulations, 1912, were made by the Treasury on February 21, 1912, under s. 83 of the Act, and on May 22, 1912, the Joint Committee of the several bodies of Commissioners appointed for the purposes of Part I. of the National Insurance Act acting jointly with the Insurance Commissioners constituted under that Act purported to certify under s. 2 of the Rules Publication Act, 1893, that on account of urgency the National Health Insurance (Collection of Contributions) Regulations, 1912, should come into operation immediately, and purported in pursuance of the powers conferred on them by the Act and by the National Insurance (Joint Committee) Regulations, 1912, to make the said National Health Insurance (Collection of Contributions) Regulations, 1912, to come into operation forthwith as Provisional Regulations. The said National Health Insurance (Collection of Contributions) Regulations, 1912, were subsequently laid before both Houses of Parliament in accordance with s. 65 of the Act, and no address was presented to His Majesty by either House of Parliament in accordance with the proviso to that section. The National Health Insurance (Collection of Contributions)

Regulations, 1912, and the National Insurance (Joint Committee) Regulations, 1912, were annexed to and were to be read as part of the case.

On the part of the appellant it was contended (1.) that in failing to pay seven consecutive contributions in respect of one employed contributor he was guilty of only one offence and one penalty only could be imposed in respect thereof, and (2.) that no valid regulations had been made under the Act providing for matters incidental to the payment and collection of contributions, and that the National Health Insurance (Collection of Contributions) Regulations, 1912, were bad in that the Regulations were made provisionally contrary to the Act, and in that the Joint Committee and Insurance Commissioners were not rule-making authorities within the meaning of the Rules Publication Act, 1893.

On the part of the respondent it was contended (1.) that each failure to pay a contribution in respect of an employed contributor was a separate offence for which a separate penalty could be imposed, and (2.) that the National Health Insurance (Collection of Contributions) Regulations, 1912, were valid regulations under the Act.

The justices were of opinion, and held, that the respondent's contentions were right, and they convicted the appellant and ordered him to pay in respect of each of the twenty-eight informations a fine of 1*s.* and to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he had failed to pay.

The question for the opinion of the Court was whether upon the above statement of facts the justices had come to a correct determination and decision in point of law.

Sanderson, K.C. (*Profumo* and *Blanco White* with him), for the appellant. The first question raised by this case is whether the failure by an employer to pay the contribution in respect of an employed contributor in seven successive weeks can be dealt with as seven separate offences. It is not disputed that a separate summons could be issued each week that the contribution was not made, but if the authorities take no steps until several weeks'

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contributions have not been paid, they are not then entitled to institute separate prosecutions and render the employer liable to a fine of 10*l.* for each failure to pay. Sect. 69, sub-s. 2, says "if any employer has failed to pay any contributions" he is liable to a fine, and is liable to pay a sum equal to the amount of the contributions which he has failed to pay. The meaning of that is that, whether there has been one or more failures to pay contributions, the employer can only be prosecuted and punished for one offence. The use of the plural word contributions in s. 69 is contrasted with the expression "weekly contribution," which is used throughout the Act when a single payment is being referred to.

Secondly, the Regulations are invalid. They were issued as provisional regulations and are still provisional regulations and nothing else, and the Insurance Commissioners have no power under the Act, and the Joint Committee have no power under the Treasury Regulations, to issue provisional regulations. They were bad in their inception and could never be made good afterwards. The Regulations which have to be made under s. 65 are to take effect as if enacted in the Act; they are to become part of the Act; but a provisional Act of Parliament is an absurdity. It is not open to the prosecution to say now that the word "provisional" and the certificate as to urgency are mere surplusage. They must stand or fall by the Regulations as made. The Rules Publication Act, 1893, cannot be relied on as giving validity to these Regulations, first, because that Act does not apply at all to regulations of this kind which when made become part of an Act of Parliament; and, secondly, because it only deals with statutory rules, and the only persons who can make statutory rules are those specified in s. 4 or a Government department. Neither the Insurance Commissioners nor the Joint Committee are a Government department. The words "some other Government department" in s. 112, sub-s. 4, of the Insurance Act are intended to refer to the Board of Trade, which is mentioned in that section.

The Regulations are also invalid for another reason. They purport to be authenticated by the seals of the Joint Committee and of the Insurance Commissioners, and by the signatures of

their respective secretaries. The Insurance Commissioners are by s. 57, sub-s. 2, authorized to use an official seal, but no such authority is given to the Joint Committee. There is therefore no evidence that these Regulations were made validly or at all. It is admitted that this point was not expressly taken before the justices; but it is open to the appellant to take it here because the contention was raised that no valid regulations had been made under the Act.

[LORD ALVERSTONE C.J. We do not think that you are entitled to raise this point.]

Lastly, the Joint Committee had no power to make these Regulations. Their powers are by s. 83, sub-s. 2, limited to making the necessary financial adjustments between the several funds under the control of the several bodies of Commissioners, and the general words at the end of sub-s. 2 must be construed with reference to those limited powers. Clause 5 (*c*) of the Treasury Regulations, which purports to empower the Joint Committee to make regulations under s. 7 of the Act for the payment and collection of contributions, is therefore ultra vires as it does not relate to matters of financial adjustment. If the powers given by sub-s. 2 of s. 83 are unlimited there was no object in giving the specific powers mentioned in sub-s. 3.

Sir John Simon, S.-G. (*Travers Humphreys* and *G. A. H. Branson* with him), for the respondent. The word "contributions" is used in the plural in s. 69, sub-s. 2, because the employer has to pay two contributions each week, one for himself and one on behalf of the employed contributor: see s. 4 and Scheds. II. and III. [He was stopped and desired to confine his argument to the point raised as to the Treasury Regulations.] The powers conferred on the Joint Committee by s. 83, sub-s. 2, are twofold—first, to make the necessary financial adjustments; secondly, "to perform such powers and duties of the several bodies of Commissioners under this Part of the Act, either alone or jointly with any of those bodies," as may be provided by the Regulations to be made by the Treasury. The second power cannot be limited by the first, and clause 5 (*c*) of the Treasury Regulations is clearly within the express object of s. 83, sub-s. 2.

Sanderson, K.C., replied.

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LORD ALVERSTONE C.J. In these four cases certain questions arise for our decision under the National Insurance Act, 1911. Some of the questions are common to all the cases, but there is one point that is raised only in *Morris* v. *Ashton* and *The King* v. *Hedderwick*. In the first case, *The King* v. *Baggallay*, a rule nisi was granted for a certiorari to quash the conviction of a Mr. Hurlock for failing to pay a contribution under the Act in respect of an employed contributor. When the rule nisi was applied for, the Court was not informed that the magistrate, Mr. Baggallay, had been asked to state a case and had consented to do so. I do not desire to impute any blame to the learned counsel who applied for the rule; the case had not at that time actually been stated, and it may have been thought that grounds existed for a certiorari independently of the questions of law which might be raised by the case. I refer to the fourth, fifth, and sixth grounds stated in the rule nisi. Those grounds, if well founded, would have been grounds for a certiorari. The other three grounds, the first, second, and third, which are the same as the third, fourth, and fifth contentions raised in the case stated, are not grounds for a certiorari, but it is a convenient practice, and one which I have endeavoured to maintain, that when a rule nisi is granted the grounds on which the rule is applied for should be set out in the rule nisi.

I think that it will be a convenient course if I first deal with the fourth, fifth, and sixth grounds set out in the rule nisi. Those grounds are that the charge laid in the information did not amount in law to an offence over which the magistrate had jurisdiction under the Summary Jurisdiction Act, 1879; that the combined effect of adjudication by a conviction and orders for payment of money was not within the magistrate's jurisdiction under the Summary Jurisdiction Act, 1879; and that the conviction in law disclosed no offence under the National Insurance Act, 1911. The information alleged that Hurlock, the employer, had failed to pay the contribution which he was liable to pay under Part I. of the Insurance Act in respect of an employed contributor, named Tinney, "contrary to the National Insurance Act, 1911, and the Regulations made thereunder by the Insurance Commissioners." The conviction was that Hurlock

had unlawfully failed to make the contribution amounting to the sum of 7*d.* "and it is adjudged that the defendant for his said offence do forfeit and pay to the clerk of the Court the sum of 5*l.* and five guineas for costs forthwith, and in default of payment it is adjudged that the sums due under this adjudication be levied by distress," and it was further ordered, in pursuance of the Act and the Regulations, that Hurlock should pay to the Insurance Commissioners 7*d.*, that being the amount of the contribution. The section of the Insurance Act which makes the failure to pay a contribution an offence is s. 69, and that section provides that for each offence the employer shall "be liable on summary conviction to a fine" and "to pay the Insurance Commissioners a sum equal to the amount of the contributions" which he has failed to pay. I will assume for the moment that there was an obligation on this employer under the Act and Regulations to pay the contribution in question. It is contended on his behalf that the offence is not one which can be dealt with summarily and that the conviction is also bad because it ordered the defendant to pay the contribution as well as a fine. When one considers the language of s. 51 of the Summary Jurisdiction Act, 1879, it seems to me that these points are barely capable of serious argument, for sub-s. 1 of that section provides that "Where in any future Act, any offence is directed or authorised to be prosecuted summarily, or on summary conviction"—the very words which are used in s. 69 of the Insurance Act,—"or any fine is directed or authorised to be recovered summarily or on summary conviction, or any other words are used implying that such offence is to be prosecuted or fine is to be recovered in manner provided by the Summary Jurisdiction Acts, the Summary Jurisdiction Acts shall apply accordingly." That is very wide language, for the section does not require the actual use of the words "summary conviction" (though those words are in fact used in s. 69), but contemplates the use of any words which imply that the offence is to be prosecuted in the manner provided by the Summary Jurisdiction Acts. Then sub-s. 2 of s. 51 is expressly in point as to the order for the payment of the amount of the contribution to the Insurance Commissioners. It says: "Where in any future Act any sum of money is directed or

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authorised to be recovered before a Court of summary jurisdiction, or on complaint made to a Court of summary jurisdiction, or words are used (whether by authorising the sum to be recovered summarily or in a summary manner or otherwise) which imply that such sum of money is to be recovered before a Court of summary jurisdiction or in manner provided by the Summary Jurisdiction Acts, the Summary Jurisdiction Acts shall apply accordingly." That sub-section contemplates that the sum which is ordered to be paid, as well as the fine, may be dealt with by a Court of summary jurisdiction. Then sub-s. 3 provides that "Where in any future Act a Court of summary jurisdiction is authorised to order or require a person to do or abstain from doing any act or thing other than the payment of a sum of money; or where in pursuance of any such Act any act or thing other than the payment of a sum of money is required or authorised by an order of a Court of summary jurisdiction to be done, or is declared capable of being enforced summarily, or by summary order; or where in any such Act any words are used implying that such act or thing is to be enforced in manner provided by the Summary Jurisdiction Acts, the Summary Jurisdiction Acts shall apply accordingly." I do not read that third sub-section because it has any very direct application to the questions raised in these proceedings, but because it shews that the Act of 1879, for the purpose of the points which we are now considering, establishes a code of procedure as to which in my judgment there is really no doubt. I quite appreciate that these points are being raised on behalf of persons who think that the whole Insurance Act is a bad thing, and one almost feels bound to compliment counsel upon his ingenuity in discovering these points, but I do not think that these points would have been seriously argued if the cases had arisen under any other Act than the Insurance Act. I have dealt with them seriously, but I think that there is nothing in them, and that they are completely answered by the sections of the Summary Jurisdiction Act which I have read.

I will now deal with the other points, and I will take them as stated in the case of *Hurlock* v. *Shinn*. The first contention raised in *Hurlock* v. *Shinn* is the point as to summary

conviction which I have already dealt with. The second is as follows: [The Lord Chief Justice read the second contention in *Hurlock* v. *Shinn* set out above.] Again I feel I ought to compliment Mr. Jellicoe on the courage and ingenuity displayed in raising this contention. It practically amounts to this, that there was no power to make any regulations for the recovery of contributions, unless regulations are at the same time in force for the provision of the medical, sanatorium, and other benefits contemplated by the Act. I do not propose to go in detail through the sections of the Act which shew in my opinion that it is quite impossible to give effect to this contention. It is sufficient to say that it clearly appears from the Act that the contributions have to be paid for some time before any benefits are to be received, that certain of the benefits are not to come into operation until next year, and that in any event they could not be and were not intended to be available on July 15 in this year, the date when the payment of contributions commenced. It is impossible to hold that the regulations for the recovery of contributions could not be enforced until either the benefits to be provided by the Act were in fact being received by the insured persons or regulations had been made for the effective provision of those benefits.

The third and fourth contentions raised in *Hurlock* v. *Shinn* relate to the Regulations as to the payment and collection of contributions which were issued by the Commissioners on May 22, 1912. The fifth contention only deals with the way in which the money is to be paid, and does not give rise to any serious question about the Regulations themselves.

The point of importance is raised by the third contention and is the one to which the main part of the arguments have been addressed. But before dealing with this point I think it would first be convenient to refer to a point relating to the validity of the Regulations which was raised by Mr. Sanderson in the course of his argument in *Morris* v. *Ashton*. It was suggested that these Provisional Regulations were not properly before the Court, because, it was said, they were only authenticated on behalf of the Joint Committee by the signature of their secretary and their seal, and it was said that although the Act

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by s. 57 authorizes the use of an official seal by the Insurance Commissioners, there is no such authority given to the Joint Committee. It was not denied that this point is not formally and expressly raised by the case, but it was said that it was covered by the contention that no valid regulations had been made. I said when the point was raised in argument that if on the facts stated in the case the point was open the appellant was entitled to avail himself of it, but it is always necessary that the facts should be so found that the Court can deal with the point of law. In this case nothing is said as to the manner in which these Regulations were made. The case finds as a fact that they were made, and a copy of them is annexed to the case, and it would in my opinion be contrary to the practice of the Court to allow any point to be taken now as to the manner in which the Regulations have been made. There are no facts found by the justices which would enable us to deal with that point.

I will now deal with the questions raised as to the validity of the Regulations of May 22, 1912. They are headed "Provisional Regulations" and may be cited as the National Health Insurance (Collection of Contributions) Regulations, 1912. It will be convenient if I briefly refer to the material sections of the Act which have been cited to us and commented upon. Sect. 4 provides for the payment of contributions in respect of employed contributors at the rate specified in Part I. of the Second Schedule. The section is silent as to the date when the payment of contributions is to begin, but it is not disputed that the actual date is fixed by the Regulations. Sect. 7 empowers the Insurance Commissioners to make regulations providing for any matters incidental to the payment and collection of contributions, and in the same section there are provisions as to the payment being by means of stamps on cards, and so on. Therefore, in addition to another section conferring general powers to which I will refer in a moment, we find in s. 7 express power given to the Insurance Commissioners to make these Regulations. The section which confers the general powers to make regulations is s. 65, and it is as follows: "The Insurance Commissioners may make regulations for any of the purposes for which regulations may be made under this Part of this Act or the schedules therein referred to, and for prescribing

anything which under this Part of this Act or any such schedules is to be prescribed, and generally for carrying this Part of this Act into effect, and any regulations so made shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this Act." I believe that other instances may be found where statutory powers have been given to make regulations which when made are to have the force and effect of an Act of Parliament. (1) Then s. 65 goes on to provide that if within twenty-one days an address is presented by either House of Parliament to His Majesty the Regulations may be annulled and shall thenceforth be void. Of course that has not occurred with regard to these Regulations. I next refer to s. 83, which is of importance because it deals with the Joint Committee of the several bodies of Commissioners, and these Regulations purport to have been made by the Joint Committee jointly with the Insurance Commissioners for England. Sub-s. 1 of s. 83 provides for the constitution of the Joint Committee in accordance with the regulations to be made by the Treasury, and sub-s. 2 is as follows: "The Joint Committee may make such financial adjustments as may be necessary between the several funds under the control and management of the several bodies of Commissioners and shall exercise and perform such powers and duties of the several bodies of Commissioners under this Part of this Act, either alone or jointly with any of those bodies, as may be provided by such regulations."

This brings me to a point which I can conveniently deal with now because it relates to the Treasury Regulations, under which the Joint Committee is constituted, and in particular to 5 (*c*) of those Regulations, which provides that the Joint Committee shall exercise jointly with the Insurance Commissioners the power conferred by s. 7 of the Act of making regulations with regard to the payment and collection of contributions. It was contended that that regulation, 5 (*c*), is ultra vires. It was said that by s. 83, sub-s. 2, the power given to the Joint Committee to exercise

(1) See, for example, Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 75, and Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 51, sub-s. 2.

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and perform the powers and duties of the several bodies of Insurance Commissioners was, by the earlier words of sub-s. 2, confined to questions of financial adjustment. I am not at all sure that those words would not be wide enough to include matters relating to the collection of contributions, but in any event I think it would be giving far too narrow a construction to the latter words of sub-s. 2 to read them as applying only to questions of financial adjustment. It was further said that clause 9 of the Treasury Regulations was an instance of powers being given to the Joint Committee which exceeded the limited rights and powers conferred by s. 83, but I fail to see how anything in clause 9 can affect the powers conferred by clause 5 (*c*). In my opinion the Treasury Regulations are not ultra vires.

The last section of the Act to which I have to refer is s. 115, which provides that the Act shall come into force on July 15, 1912. I have now referred to all the material sections of the Act, and it is clear that power has been conferred by the Act on the Insurance Commissioners and the Joint Committee to make regulations with regard to the collection of contributions, and those two bodies have purported to make these National Health Insurance (Collection of Contributions) Regulations, 1912. Before proceeding to consider the main question whether the Regulations taken as a whole are invalid, I will shortly deal with the points which have been raised with regard to the validity of a particular clause of the Regulations. Clause 6 (*a*) of the Regulations deals with the times for affixing the stamps to the contributor's card and provides that, where money payment is made by the employer, the time for affixing the stamp shall be "before the money payment in respect of the period for which the contribution is payable." It is said that that provision is ultra vires because s. 4, sub-s. 1, of the Act says that the contributions "shall be payable at weekly or other prescribed intervals." I do not think there is anything in this point. I do not see why the periods of time at which the stamps are to be affixed, as provided by 6 (*a*), should not be called prescribed intervals. I agree that they are not prescribed in the sense of being fixed at a certain number of days or weeks, but they are prescribed with reference to an act or contingency, namely, the making of a money

payment by the employer to the contributor. This regulation appears to me to be within the language of s. 7 a valid regulation providing for "matters incidental to the payment and collection of contributions."

The main argument which has been addressed to us on the subject of these Regulations is that they are entirely invalid because they are called "Provisional" Regulations, and because they purport to have been brought into operation immediately, having been certified as urgent under s. 2 of the Rules Publication Act, 1893. I do not desire in the least to shirk the responsibility of deciding any questions that it may be necessary to decide, but in my opinion it is not necessary, in the cases now before the Court, for us to decide, and I do not intend to decide, the question whether the Joint Committee or the Insurance Commissioners or the two bodies combined are a Government department within the meaning of s. 4 of the Rules Publication Act, 1893. That Act gives no original power to make rules. What it does do is by s. 2 to authorize a rule-making authority, by certifying urgency, to make any rules to come into operation forthwith as provisional rules, and rules so made are only to continue in force until rules have been made in accordance with the other provisions of the Act. It is no doubt the fact that the Joint Committee and the Commissioners have certified that on account of urgency the Regulations of May 22, 1912, were to come into operation immediately. I must confess that I have some difficulty in seeing why it was thought necessary that these Regulations should come into force before July 15, the date when the Act itself came into force. It may be that the authorities thought that as arrangements for carrying the Act into effect would be made between May 22 and July 15 it was desirable that the Regulations affecting those arrangements should be in force at that time. But however that may be, it seems to me that there is one very short answer to this objection to the validity of the Regulations. Either it was necessary that the Regulations should be made provisionally and should be brought into force at once or it was not. If it was not necessary, the Regulations, which for the reasons which I have given were validly made under the powers conferred by the Insurance Act,

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are none the less valid because they were described as provisional. If on the other hand it was necessary, the Act of 1893 was only required for the purpose of bringing the Regulations into force at once, and assuming that the Joint Committee and the Insurance Commissioners had no power to act under the Act of 1893, the fact that they purported to do so cannot affect the validity of the Regulations now that the Insurance Act, under which they were validly made, has itself come into force. As was pointed out by my brother Pickford in the course of the argument, the introduction to the Regulations contains two statements, one that the Joint Committee and the Insurance Commissioners certify that on account of urgency the Regulations are to come into operation immediately, and the other that in pursuance of the powers conferred by the Insurance Act and the Treasury Regulations they "hereby make the following regulations." Those two statements are independent of each other. The making of the Regulations was one thing; certifying urgency was another; and even if there was no power to certify urgency, that cannot in my opinion affect the validity of the Regulations.

For these reasons I have come to the conclusion that all the objections taken to the validity of the Regulations fail.

I have now only to deal with the further point that is raised in *Morris* v. *Ashton* and also in *The King* v. *Hedderwick*. In *Morris* v. *Ashton* the appellant was convicted on twenty-eight informations in respect of the failure to pay the contributions in respect of four of his servants in each of seven successive weeks. He was ordered to pay a fine of 1*s*. on each information and to pay the contribution of 7*d*. in each of the twenty-eight cases. The point was taken under s. 69, sub-s. 2, of the Act that in failing to pay seven successive contributions in respect of one employed contributor he was guilty not of seven offences, but of only one offence. In my opinion it is impossible to say that only one offence was committed. I think that the section makes it clear that each failure to pay a contribution is a separate offence, and I think that if several successive failures to pay were included in one conviction it might be successfully contended (though I do not decide this) that the conviction was bad; and if they were all included in one summons or information it might be most embarrassing and unfair to the

defendant, because the circumstances in the different cases might not be the same. I think therefore that this point also fails.

In *The King* v. *Baggallay* and *The King* v. *Hedderwick* the rules nisi will be discharged, and in *Hurlock* v. *Shinn* and *Morris* v. *Ashton* the appeals will be dismissed.

PHILLIMORE J. I agree with my Lord that these two rules nisi for certiorari must be discharged, and that judgment must be entered for the respondent in the two appeals. There are three cases brought before us in four forms. I will shortly state my reasons on the main points for agreeing with the judgment of my Lord. The chief point argued has been that no offence has been committed because the only offence alleged consists in not paying contributions as directed by the Regulations. It is contended, first, that there are no regulations because they have not been made as alleged by the Joint Committee. This point seems to me to be one of importance, and worthy of consideration on a future occasion, but it does not seem to me to be raised in the cases before us. It is admitted that it was not considered or thought of by counsel before the magistrates, and I do not think it is open in the case of *Hurlock* v. *Shinn*, though I think Mr. Jellicoe may have intended to try and raise it. The case states that "A copy of the Regulations made under sections 7 and 65 of the said Act purporting to be published by His Majesty's Stationery Office, a copy of which is hereto annexed and forms part of this case, was produced and handed to me. No proof was given of the making or promulgation of the said Regulations, but no objection was taken on behalf of the appellant to the absence of such proof." I treat this, as the case stands, as a finding that the Regulations were made. In *Morris* v. *Ashton* the finding is more specific, but it is unnecessary to read it at length because Mr. Sanderson after consideration admitted that it was conclusive against him. Therefore all I say about that point is that it is a point which deserves consideration in another case.

The next point is that, assuming that there are in fact these Regulations, they are invalid, (1.) because it is said that the powers of the Joint Committee and the Commissioners to make

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these rules,—I call them rules rather than regulations—or to make at any rate the rules applicable, arise under Treasury Regulation 5 (*c*), and that this regulation is ultra vires. Well, when one comes to look at s. 83, sub-s. 2, of the Act, it is impossible I think to say that any regulation with regard to the apportionment or devolution of duty between these bodies which the Treasury can make, for example, devolving upon the Irish Commissioners Scotch business, or vice versa, can be ultra vires. The Joint Committee is to "exercise and perform such powers and duties of the several bodies of Commissioners either alone or jointly with any of those bodies as may be provided by such Regulations." It is said that that enables the Treasury to empty the Commissioners of all their powers. That is so. It is clear that the Act of Parliament has contemplated that; and it is obvious to any one who studies those sections that s. 83 represents the conflict between the supporters of centralization and the supporters of decentralization, and it has resulted in a compromise. Originally, we are told, there was to be one body of Insurance Commissioners; then it was agreed that there should be four bodies in four different parts of the kingdom, and then it was found that that would be unworkable unless there was a fifth body which might either act jointly with, or, if necessary, supersede, all the other four, and s. 83 is the result of that legislation. I think, therefore, that the Treasury had power to devolve upon the Joint Committee jointly with the Insurance Commissioners for England, in this case, the powers which they purported to devolve by regulation 5 (*c*) and by others of their Regulations.

Then comes the point which has been most discussed before us, that these are Provisional Regulations and that the Act confers no power to make Provisional Regulations. There was no necessity that I can see for introducing the reference to the Rules Publication Act, 1893, at all, unless it was thought that these rules came within that Act in the sense that the restrictive provisions of s. 1 of the Act of 1893 applied. If the restrictive provisions of s. 1 applied, then it was necessary to use the enabling provisions of s. 2 and to make rules, which the Act calls provisional, to come into operation at once. Sect. 2 provides

that "Where a rule-making authority certifies that on account of urgency or any special reason any rule should come into immediate operation, it shall be lawful for such authority to make any such rules"—then what happens—"to come into operation forthwith." It is the Act, not the rule-making authority, which makes them provisional. If the case comes within the Rules Publication Act, they become ipso facto provisional, and they continue in force until rules have been made in accordance with s. 1. Now whether or not it was necessary to make use of that Act I do not pretend to say. What I do say is that the Insurance Commissioners and the Joint Committee will have to consider very carefully whether they do come under that Act or not, because if they do they must at some future date issue final rules, and those final rules will of themselves at once cancel the provisional rules; but if on the other hand these rules are not provisional rules but final rules it will be necessary to repeal these rules when or before they enact new ones. I do not envy the person who has to decide whether or not the Rules Publication Act applies. Unless the Joint Committee and the Insurance Commissioners either separately or together are a Government department the Act does not apply. If they are, the Act probably does apply, because, though at one time I was inclined to think these rules, which are made part of the Insurance Act by s. 65 of that Act, were not such rules as the Act of 1893 was intended to deal with at all, I am now, having regard to sub-s. 4 of s. 1 of the Act of 1893, inclined to think that if these two bodies are a rule-making authority, then these rules do come within that Act and that Act must be complied with. But in my opinion it is not necessary to decide this point, because if they do come under that Act, then they are good rules, and if they do not come under that Act, then no harm has been done by the reference to certifying urgency. The only word to which exception can be taken is in the title "Provisional Regulations." I do not think that word "provisional" in the title is enough to destroy the effect of the rules. The enacting clause enacts them as rules made under the Insurance Act; that is the only power of enactment; and it is the only way in which they profess to be made. The enacting clause then contains a

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statement, not making the rules provisional, but certifying that on account of urgency the rules are to come into operation immediately as provisional regulations. It seems to me, therefore, that there is no cause to find any fault with the construction of the enacting clause of these Regulations, and that they are good enough whichever way they are looked at.

Then a subordinate point was taken, that rule 6 (1.) (*a*) is ultra vires. The argument as to that was put in two ways: first, that this rule does not prescribe intervals; on that I have nothing to add to what my Lord has said; and, secondly, that the portion of the rule which enables an employed person to require of his employer to put stamps on the insurance card at particular moments is ultra vires. I think that point may be worth a great deal of consideration at some future date. I think it is quite possible that it may go beyond the power of the Commissioners, but, again, we need not consider that in this case. The first part of the rule is good, and it is under the first part of the rule that the defendants in these cases have been convicted. There remains the point, taken by Mr. Jellicoe in the cases he has been dealing with, that no duty to pay arises until the benefits have been provided. I quite understand anybody taking that view. The Act is misleading in that respect. It starts by purporting to confer benefits and puts the taxing secondly. Historically it comes the other way; the taxing is first and the benefits, if any, after; but nevertheless there is power to tax, and that power to tax is not conditional on the provision of the benefits, and therefore I think that objection fails.

There were two smaller points, both of which I think have been covered by my Lord's judgment, but I am not sure that he mentioned one of them. Mr. Jellicoe contended that there was no proof that the card was supplied to the employer, or, if no card was supplied, that he had been brought under the conditions necessary to impose on him the duty of getting an emergency card. I doubt whether that point is open on any of these proceedings. If it is I think it is concluded by the findings of the magistrates in the various cases. The points that the magistrates had no jurisdiction to try the cases and that they had no jurisdiction to order payment of the contribution have

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been quite sufficiently dealt with in my Lord's judgment. I have only to say with regard to the one remaining point raised in *The King* v. *Hedderwick* and in *Morris* v. *Ashton*, namely, that there ought not to have been several convictions for the several weekly defaults, that for a time I was a good deal impressed by the point taken under s. 69, that apparently power is given to the magistrates to order a number of contributions to be paid on one conviction, which would look as if there could be one summons and one conviction for several weekly defaults; but I think the Solicitor-General has answered that, and I think that we must take the word "contributions" where it appears in the Act, as opposed to certain places where it appears in the Third Schedule, as meaning not a number of compound contributions by master and servant, but a compound contribution by master and servant, each of which is a contribution in itself, so that the compound contribution means two contributions, and, therefore, there is no express power given to deal with more cases than one on one summons or in one conviction, and the general law applies as provided by the Summary Jurisdiction Act, 1848. I think there cannot be one conviction for the two offences, but at any rate there can be nothing wrong in having separate summonses and convictions for each separate offence.

On these grounds I agree with what has been said by my Lord.

PICKFORD J. I agree, and I do not intend to go over all the points, and have only a very few words to say on one or two of them. With regard to the contention that there can be only one conviction under s. 69 for a continuous failure to pay, or rather, I would say, a failure to pay in several successive weeks, I think that s. 69 contemplates that each failure to pay is a separate offence, that is to say, that in the case of weekly payments there is an offence every week that payment is not made. I do not think that is properly called a continuing offence; I think it is a separate offence in each particular week. If that be so, prima facie there ought to be a summons in respect of each offence, and not one summons that would include a number of them, and I see

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nothing in the section in the word "contributions" (in the plural), or in the provisions in the latter part of the section, which, when read with the rest of the Act, would control that general law that each failure to pay in the case of weekly payments, each weekly failure to pay being a separate offence, must be the subject of a separate prosecution, and I think, therefore, that point fails.

The only other point on which I desire to say anything is the question as to whether these Regulations are invalid. It has been contended that they are invalid on some grounds which do not arise in these cases, for instance, the question of whether these Regulations were properly made, because, according to the copy supplied to us, as regards the Joint Committee, they are only signed by the secretary of the Joint Committee and authenticated, or not authenticated, by their seal, and it is said that the Joint Committee have no power to make rules under their seal and by the signature of their secretary in that way. There may or may not be a great deal in that point and others which do not arise here, and therefore I wish to express no opinion about them at all. There are, however, two main objections taken to the Regulations, and the first is that they are made jointly by the Joint Committee and by the Insurance Commissioners for England, and that the delegation of the power to make these regulations under the Treasury Regulations, which were made under the provisions of s. 83 of the Act, was a delegation which it was ultra vires of the Treasury to make. Now I do not think it necessary to consider whether such an extended delegation as that was or was not contemplated when s. 83 was enacted. Certainly curious results may follow from the full exercise of such an extended power of delegation, but whatever may have been contemplated by the framers of the Act, the words of s. 83 are so wide and so clear that there is no ground for cutting them down and limiting them simply to a delegation to make regulations as to the financial adjustment between the Commissioners of the different countries, and I think, therefore, that the point that the Joint Committee had no power to co-operate in the making of these Regulations is not a good one.

The other main objection to the validity of the Regulations is that they are provisional regulations, and being provisional regulations they are regulations which the Insurance Commissioners and the Joint Committee had no power to make. It was also contended that they are provisional regulations made under the powers of the Rules Publication Act, 1893, and not made under the Insurance Act, as I understand it, at all, and that therefore they are ultra vires altogether, because it is said the Rules Publication Act does not apply to any rules made by the Insurance Commissioners because the Insurance Commissioners are not a Government department, nor are the Joint Committee. I do not think it is necessary to consider whether the Joint Committee or the Insurance Commissioners are or are not a Government department. That is only of importance as a test to enable one to decide whether these Regulations come within the provisions of the Rules Publication Act, 1893, or not. If they do come within the provisions of the Rules Publication Act, 1893, then these provisions have been properly followed, and they are perfectly good regulations as provisional regulations, and they will continue to be in force till they are superseded by final regulations made in the ordinary way. If they do not come within the Rules Publication Act, 1893, then it seems to me that the part of the order of the Commissioners which certifies them to be urgent and makes them immediately operative as provisional regulations is bad, and the question that arises is whether that being bad it makes the rest of the order of the Commissioners bad. Now I think it is to be observed that the Regulations, whether you call them provisional or not, are not made under any powers conferred by the Rules Publication Act, 1893, at all. That Act confers no powers to make regulations or rules. It imposes restrictions upon such statutory rules as come within it, and then, in order to avoid inconveniences that may arise in some cases from those restrictions being enforced, it provides that in cases of urgency, by a certificate of the rule-making authority, rules may be made to come into operation forthwith as provisional rules. But the rules, whatever you call them, still remain rules under the original Act which gave power to the rule-making authority. In this case it is the Insurance Act in conjunction with s. 37 of the Interpretation

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Act, 1889. Under s. 37, where an Act "is not to come into operation immediately on the passing thereof," a rule-making authority is enabled to exercise the power given by that Act at any time after the passing of it "so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation." What the Commissioners and the Joint Committee jointly did in this case was, in my opinion, to make regulations under the powers given to them by the Insurance Act and the Interpretation Act; they also said that in addition to making those regulations they would certify them to be urgent under the Rules Publication Act, and they would therefore make them to come into operation at once as provisional rules. That latter part may be bad, but the making of the Regulations to my mind still remains, and if those Regulations are not within the Rules Publication Act, then the restrictions of s. 1 of that Act do not apply, and the rules would be made at the date they purport to have been made, but as they are to be part of the Insurance Act they would not come into operation until the Insurance Act came into operation. The Commissioners, apparently thinking it necessary to make them come into operation immediately, apply the provisions of the Rules Publication Act; but if they had no power to do that, the rules remain still what they were in the first instance, rules or regulations made under the Insurance Act, and, on the assumption that the Rules Publication Act does not apply, made in such a way that they came into operation when the Insurance Act came into operation. I do not think that the fact that the Commissioners have purported to give them an immediate operation, which, on this hypothesis, it was not within their power to give, makes them invalid in any way or prevents them from being regulations in fact made by these bodies under the Insurance Act. For that reason I think these Regulations were not invalid. I do not propose to go over all the other points which have been raised. They have been sufficiently dealt with by my Lord and

my brother Phillimore, and I agree in the judgments pronounced by them.

Rules discharged and appeals dismissed.

Solicitors: *Graham Harrison; D. Nimmo; Hatchett, Jones, Bisgood & Marshall.*

NOTE.—National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 4:

"(1.) The contributions payable in respect of employed contributors shall be at the rate specified in Part I. of the Second Schedule to this Act (hereinafter referred to as the employed rate), and shall comprise contributions by the contributors and contributions by their employers at the rates specified in that Part of that Schedule, and shall be payable at weekly or other prescribed intervals: . . . .

"(2.) The employer shall, in the first instance, pay both the contributions payable by himself (in this Act referred to as the employer's contributions), and also on behalf of the employed contributor the contributions payable by such contributor, and shall be entitled to recover from the contributor by deduction from his wages or otherwise the amount of the contributions so paid by him on behalf of the contributor, in accordance with the rules set out in the Third Schedule to this Act."

Sect. 7: "Subject to the provisions of this Act, the Insurance Commissioners may make regulations providing for any matters incidental to the payment and collection of contributions payable under this Part of this Act, and in particular for—

"(*a*) Payment of contributions whether by means of adhesive or other stamps affixed to or impressed upon books or cards, or otherwise, and regulating the manner, times, and conditions in, at, and under which such stamps are to be affixed or impressed or payments are otherwise to be made;"

Sect. 65: "The Insurance Commissioners may make regulations for any of the purposes for which regulations may be made under this Part of this Act or the schedules therein referred to, and for prescribing anything which under this Part of this Act or any such schedules is to be prescribed, and generally for carrying this Part of this Act into effect, and any regulations so made shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this Act: . . . . ."

Sect. 69: "(2.) If any employer has failed to pay any contributions which under this Part of this Act he is liable to pay in respect of an employed contributor, or if any such employer, any insured person, or any other person is guilty of any other contravention of or non-compliance with any of the requirements of this Part of this Act or the regulations made thereunder in respect of which no special penalty is provided, he shall for each offence be liable on summary conviction to a fine not exceeding ten pounds, and where the offence is failure or neglect on the part of the employer to make any such contributions, to pay to the Insurance Commissioners a sum equal

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to the amount of the contributions which he has so failed or neglected to pay, which sum when paid shall be treated as a payment in satisfaction of such contributions: . . . ."

Sect. 83: "(1.) There shall be constituted as soon as may be after the passing of this Act, in accordance with regulations to be made by the Treasury, a joint committee of the several bodies of Commissioners appointed for the purposes of this Part of this Act, consisting of such members of each such body selected in such manner as may be provided by the regulations and of a chairman and other members (not exceeding two in number) to be appointed by the Treasury, and the chairman shall not by reason of his office be incapable of being elected to or voting in the Commons House of Parliament.

"(2.) The joint committee may make such financial adjustments as may be necessary between the several funds under the control and management of the several bodies of Commissioners, and shall exercise and perform such powers and duties of the several bodies of Commissioners under this Part of this Act, either alone or jointly with any of those bodies, as may be provided by such regulations."

Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 37: "Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or bye-laws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 1: "(1.) At least forty days before making any statutory rules to which this section applies, notice of the proposal to make the rules, and of the place where copies of the draft rules may be obtained, shall be published in the *London Gazette*."

Sect. 2: "Where a rule-making authority certifies that on account of urgency or any special reason any rule should come into immediate operation, it shall be lawful for such authority to make any such rules to come into operation forthwith as provisional rules, but such provisional rules shall only continue in force until rules have been made in accordance with the foregoing provisions of this Act."

Sect. 4: "In this Act 'statutory rules' means rules, regulations, or bye-laws . . . . made by Her Majesty in Council, the Judicial Committee, the Treasury, the Lord Chancellor of Great Britain, or the Lord Lieutenant or the Lord Chancellor of Ireland, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary for Ireland, or any other Government Department.

"'Rule-making authority' includes every authority authorised to make any statutory rules."

STATUTORY RULES AND ORDERS, 1912.

No. 175.

NATIONAL INSURANCE.

NATIONAL HEALTH INSURANCE.

THE NATIONAL INSURANCE (JOINT COMMITTEE) REGULATIONS, 1912, DATED FEBRUARY 21, 1912, MADE BY THE TREASURY UNDER SECTION 83 OF THE NATIONAL INSURANCE ACT, 1911 (1 & 2 GEO. 5, C. 55).

In pursuance of the powers conferred upon them by section 83 of the National Insurance Act, 1911, and of every other power enabling them in this behalf, the Lords Commissioners of His Majesty's Treasury hereby without prejudice to any further exercise of such powers make the following Regulations:—

1. These regulations may be cited as the National Insurance (Joint Committee) Regulations, 1912.

. . . . . .

5. For the purposes of the provisions of the Act relating to contributions, the Joint Committee shall exercise jointly with the several bodies of Commissioners the following powers namely:—

(*a*) under sub-section (1.) of section 4 and sub-section (1.) of section 5 of the Act, the power of prescribing the intervals at which contributions payable in respect of employed contributors and voluntary contributors respectively are to be payable.

. . . . . .

(*c*) under section 7 of the Act, the power of making regulations for matters incidental to the payment and collection of contributions.

NATIONAL INSURANCE ACT, 1911.

NATIONAL HEALTH INSURANCE.

PROVISIONAL REGULATIONS, MADE BY THE JOINT COMMITTEE ESTABLISHED UNDER THE NATIONAL INSURANCE ACT, 1911, AND THE INSURANCE COMMISSIONERS ESTABLISHED UNDER THE SAID ACT, ACTING JOINTLY, AS TO THE PAYMENT AND COLLECTION OF CONTRIBUTIONS, DATED MAY 22, 1912.

National Health Insurance Joint Committee, } W. J. BRAITHWAITE.

National Health Insurance Commission (England), } CLAUD SCHUSTER.

Ordered, by The House of Commons, *to be printed.*

The Joint Committee of the several bodies of Commissioners appointed for the purposes of Part I. of the National Insurance Act, 1911, acting jointly with the Insurance Commissioners constituted under that Act, hereby certify under Section 2 of the Rules Publication Act, 1893, that on account of urgency the following Regulations should come into operation immediately, and in pursuance of the powers conferred on them by the National Insurance Act, 1911, and by the National Insurance (Joint Committee)

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Regulations, 1912, hereby make the following Regulations to come into operation forthwith as Provisional Regulations.

GENERAL.

1. [*Short title.*]—These Regulations may be cited as the National Health Insurance (Collection of Contributions) Regulations, 1912.

. . . . . .

6.—(1.) [*Stamping of Cards.*]—The times for affixing a stamp or stamps to the card of a contributor in respect of contributions payable under the Act shall be the times following, that is to say:—

(*a*) where money payment is made by the employer in respect of any employment—before the money payment in respect of the period for which the contribution is payable, so, however, that before the expiration of the period of currency of the card, or before the termination of the employment, or at any time if the contributor so demands and gives to the employer twenty-four hours' notice of his demand, the employer shall affix to the card a sufficient number of stamps to make payment for all the weekly contributions payable in respect of the period ending at the date of that expiration, termination, or demand; and

(*b*) where no money payment is made by the employer,—on the first day of employment in each week:

Provided that if an employed contributor fails to deliver to his employer a card in accordance with these Regulations, the employer shall pay the contribution payable in respect of him by affixing a stamp to an emergency card and shall forthwith deliver that card to the contributor duly stamped in accordance with these Regulations.

F. O. R.

CHESHIRE LINES COMMITTEE, Appellants *v.* HEATON NORRIS URBAN DISTRICT COUNCIL, Respondents.

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July 29.

Local Government—Dangerous Places—Repair—Public Footpath running along Bank of River—Erosion of Bank—Danger to Public using Footpath—Liability of Owner of Bank to repair—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), *s.* 30.

A public footway ran along the top of a high bank of the river Mersey. By the action of the weather and by erosion caused by the river eating away the bank, portions of the bank upon which the footpath ran were washed away, portions of the footway fell into the river, and further portions of the bank were threatening to fall into the river. The footway was thus rendered dangerous to persons lawfully using it. The appellants were the owners of parts of the bank and of the site over which the footway ran; but there was no obligation upon them to repair the footway ratione tenuræ.

The local authority gave the appellants notice, under s. 30 of the Public Health Acts Amendment Act, 1907, to repair and protect the bank so as to prevent any danger therefrom. The appellants did not comply with the notice, and the respondents, having repaired the bank by doing work which was necessary to protect the public from danger when using the path, sought to recover the expense from the appellants under s. 30, sub-s. 2:—

Held, that the locus in quo was not a "bank" within the meaning of s. 30, and that therefore the appellants were not bound to comply with the notice.

The respondents, the Heaton Norris Urban District Council, took summary proceedings against the appellants, under s. 30 of the Public Health Acts Amendment Act, 1907 (1), for that they as

(1) 7 Edw. 7, c. 53, s. 30: "With respect to the repairing or enclosing of dangerous places the following provisions shall have effect (namely):—

"(1.) If in any situation fronting, adjoining, or abutting on any street or public footpath, any building, wall, fence, steps, structure or other thing, or any well, excavation, reservoir, pond, stream, dam or bank is, for want of sufficient repair, protection, or enclosure dangerous to the persons lawfully using the street or footpath, the local authority may, by notice in writing served upon the owner, require him, within the period specified in the notice and herein-after in this section referred to as the 'prescribed period,' to repair, remove, protect, or enclose the same so as to prevent any danger therefrom:

"(2.) If, after service of the notice

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the owners of portions of the bank of the river Mersey fronting, adjoining, or abutting on a public footpath situate in Heaton Mersey, within the urban district of Heaton Norris, which was for want of sufficient repair and protection dangerous to persons lawfully using the footpath, and the respondents having by notice in writing required the appellants to repair and protect the said bank so as to prevent any danger therefrom within the time therein specified, which time had elapsed, did not comply with such notice, whereupon the respondents had caused such works as they thought proper to be done for effecting such repairs and protection of the bank, and the expenses thereof amounted to the sum of 38*l.* 16*s.* 8*d.*, which sum or any part thereof the appellants had not paid, but refused so to do, although the same had been lawfully demanded. The justices held that the appellants were liable to pay to the respondents the sum of 19*l.*, representing the cost of repairing and protecting a portion of the river bank, and the sum of 3*l.* 3*s.* for costs.

At the hearing of the summons the following facts were found by the justices :—

(*a*) The respondents are the local authority through whose district the footpath hereinafter mentioned runs. The appellants are a railway company part of whose railways are situate in the said district.

(*b*) An ancient public footway from Stockport to Heaton Mersey runs along the top of the bank of the river Mersey, the footway being some twenty feet above the water level at ordinary times, and is bounded on one side by the bank of the river Mersey. There was no evidence given at the hearing of any obligation upon the appellants to repair the footway ratione tenuræ.

(*c*) By the action of the weather and by erosion caused by the river Mersey eating away the bank, portions of the river bank on

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on the owner, he shall neglect to comply with the requirements thereof within the prescribed period, the local authority may cause such works as they think proper to be done for effecting such repair, removal, protection, or enclosure, and the expenses thereof shall be payable by the owner, and may be recovered summarily as a civil debt."

which the footway ran were washed away and portions of the footway fell into the river and further portions of the bank were threatening to fall into the river, and the way was thereby rendered dangerous to persons lawfully using the same.

(*d*) The appellants are the owners of parts of the bank and of the site over which the footway runs.

(*e*) The respondents obtained an order from the Local Government Board in 1908 putting in force Part II. of the Public Health Acts Amendment Act, 1907, in their district as from the 1st day of January, 1910, and on the 28th day of December, 1910, in pursuance of the provisions of s. 30 of that Act, they gave to the appellants a notice as follows:—

"Whereas portions of the bank of a certain stream called or known as the river Mersey of which you are the owners fronting or abutting on a public footpath situate at Heaton Mersey within the district of the Heaton Norris Urban District Council are for want of sufficient repair and protection dangerous to the persons lawfully using the said footpath: Now therefore the said council in pursuance of the provisions of section 30 of the Public Health Acts Amendment Act, 1907, hereby give you notice to repair and protect the said bank so as to prevent any danger therefrom within seven days from the date hereof and notice is hereby further given that if you neglect to comply with the requirements hereof within the period aforesaid the said council will cause such works as they think proper to be done for effecting such repair and protection of the said bank and charge you with the expenses thereof."

(*f*) The appellants did not comply with the notice, and the respondents thereupon repaired the bank and claimed from the appellants the sum of 38*l.* 16*s.* 8*d.* for the expenses incurred.

(*g*) The work done by the respondents to the bank adjoining the land of which the appellants are owners was necessary to protect the public lawfully using the footway from danger when so using it.

The respondents contended that s. 30 of the Public Health Acts Amendment Act, 1907, applied and rendered the appellants liable for the expenses incurred.

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The appellants contended—

(*a*) That the Public Health Acts Amendment Act, 1907, is to be construed as one with the Public Health Acts, and s. 30 of that Act does not extend to alter the incidence of the charge of repairing and maintaining public highways.

(*b*) That the footway being an ancient public highway it lay upon the inhabitants at large to maintain the highway and keep it in repair and for that purpose to repair and maintain the support of the footway, to wit, the river bank, and prevent the same being eaten away by the action of the weather and by the erosion caused by the river Mersey, or in the alternative to restore the bank when so eaten away.

(*c*) That the danger to persons lawfully using the footway was due to the neglect of the respondents to fulfil their duty in that behalf and that the respondents alone were responsible for the footway being dangerous to persons lawfully using the same.

(*d*) That the said section does not extend to places which by the action of natural causes alone and beyond the powers of owners of land to prevent become dangerous to persons using a street or footpath and is limited to places which by reason of artificial works made and constructed by owners of land near to a street or public footpath are rendered or become dangerous to persons lawfully using such street or public footpath.

(*e*) That the river Mersey is not a stream within the meaning of the said section.

(*f*) That the said section does not impose new duties and liabilities upon owners of land fronting, adjoining, or abutting upon any street or public footpath, but gives further and better remedies to enable the local authorities to enforce upon such owners the performance of duties whereunto such owners were by law theretofore liable.

(*g*) That the said section does not impose obligations upon the owners of land in relief of public authorities nor shift public burdens on to the shoulders of such owners.

The justices were of opinion that for the cost of repairing so much of the river bank as was not the property of the appellants the respondents were not entitled to succeed, and, in so far as the work done on so much of the bank as belonged to the appellants

was done to prevent the footway being washed away, the appellants were equally not liable, as they were not bound either to repair or maintain the footway, but in so far as the work was necessary to protect the public using the footway from danger they were liable.

The question for the opinion of the Court was whether upon the above statement of facts the appellants were liable to repair or protect the bank of the river of which they were the owners or of which they were not the owners or at both places, and whether the justices came to a correct determination in point of law.

The chairman of the justices, at the hearing, delivered a written judgment as follows: "This is a summons by the Heaton Norris Council in which they seek to recover from the respondents the sum of 38*l.* 16*s.* 8*d.* for money expended by them in repairing the bank of the Mersey. On the edge of the river there is a public footpath from Stockport to Heaton Mersey, bounded on one side by the river; the respondents are the owners of a part of the bank, which the council have repaired; and are in another part the owners of land on the side of the path farthest from the river, but the bank which has been repaired is not owned by them. The council's claim is made under s. 30 of the Public Health Act, 1907. This section enacts . . . . The council gave the respondents the required notice; they did nothing, so the council repaired the bank of the river and incurred the cost they now seek to recover from the respondents. In order to recover the council must prove (1.) that the respondents are the owners of the bank on which they have done the work; (2.) that the work they have done was necessary to protect the public using the footpath from danger when so using it. As to the first point, I am of opinion that for the cost of repairing so much of the bank as is not the property of the respondents the council are not entitled to succeed. It is true that the respondents own the land on the farthest side of the footpath, but they could not repair the bank without committing a trespass, and the statute does not authorize or compel this. As to the work done on so much of the bank as belongs to the respondents, I am of opinion that, in so far as such work was done to prevent the footpath being washed away, the respondents

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are equally not liable, as they are not bound either to repair or maintain the footpath; but, in so far as the work was necessary to protect the public using the footpath from danger, they are liable. If, for instance, a fence would have been sufficient, they are liable to pay the cost of a fence. No evidence was given on this point, but as the principle is decided there ought to be no difficulty in agreeing on a sum.

"What I mean is, that they are not liable to pay the cost of embanking the river, if that is done for the protection of the footpath and not for the protection of the public. Any bank of a river is not necessary for the purpose of preventing people falling into it; a fence would prevent people falling into the river."

E. Sutton, for the appellants. The provisions of s. 30 are intended only to protect the footpath or highway from any structure or act made or done by the owner of the land fronting, adjoining, or abutting thereon. They were not intended to impose upon the landowners any obligation to maintain or repair highways which was not otherwise imposed on them by law. If the decision of the justices in this case is right, the effect of this section is to shift the burden of maintaining a public highway from the local authority to the landowner. There is no legal obligation upon a landowner to maintain or repair a public footpath unless he is bound to do so ratione tenuræ: *Rundle* v. *Hearle*. (1) Under the provisions of s. 83 of the Towns Improvement Clauses Act, 1847 (2), which impose an obligation upon the local authority to cause a street to be protected so as to prevent danger to passengers from any building, hole, or other place near thereto, it was held that the section referred only to artificial things: *Wilson* v. *Halifax Corporation*. (3) Sect. 30 applies only to something artificial which endangers the safety of passengers on a footpath or street and to the owner of that artificial thing. [He referred to *Short* v. *Hammersmith Corporation* (4) and *Sandgate District Council* v. *Kent County Council*. (5)]

(1) [1898] 2 Q. B. 83.
(2) 10 & 11 Vict. c. 34.
(3) (1868) L. R. 3 Ex. 114.
(4) (1910) 104 L. T. 70.
(5) (1898) 79 L. T. 425.

Macmorran, K.C., and *C. Atkinson*, for the respondents. The only reported case upon this section is *Carshalton Urban Council* v. *Burrage.*(1) In that case an ancient chalk pit was separated by an unfenced strip of land from a public highway; the defendant was the owner of the strip of land but not of the pit; from erosion by weather a small part of that strip had slipped into the pit; and it was held that under this section the local authority could require the defendant to erect a fence on his land enclosing the pit. Sect. 30 is intended to and does increase the burden of landowners with reference to public highways, and therefore it is not useful to consider their common law liabilities. With regard to the second group of things specified in the section, namely, "well, excavation, reservoir, pond, stream, dam, or bank," the provisions of s. 30 clearly impose upon the landowner a duty to afford protection to the public which is beyond any common law liability and extends to any case where a footpath is rendered dangerous by reason of being undermined or any similar cause. The respondents do not contend that a duty is imposed upon the appellants to repair the footpath, but only as owners to repair and maintain the bank which has caused the path to be dangerous, that is, to prevent the footpath slipping into the river. The liability of the local authority to repair and maintain the public highway remains, but an obligation is imposed upon the owners of the bank to prevent it being dangerous to persons using the way. This Act contains provisions which had commonly been inserted in local Acts and makes them of general application, and it may be that some of these provisions while perfectly reasonable in a particular locality may be thought to be unreasonable in another. The extent of the burden imposed in a particular case cannot, however, affect the operation of s. 30. This case plainly comes within the words "bank dangerous to the persons lawfully using the footpath."

LORD ALVERSTONE C.J. In this case I do not intend to decide anything except that the locus in quo where the work has been done, the cost of which it is sought to charge upon the appellants, does not come within the provisions of s. 30 of the Public Health

(1) [1911] 2 Ch. 133.

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Lord Alverstone C.J.

Acts Amendment Act, 1907. That section is difficult to construe. I can conceive many cases in which its provisions were clearly wanted, but I do not intend to decide how far it goes, though I have a clear opinion that it does not include the present case.

I will first very briefly summarize the facts. The appellants have the legal estate in two pieces of land which extend to the middle of the Mersey. When they acquired that land there was an old public footpath upon it. It is not suggested that they are bound to maintain that footpath either by any statute or ratione tenuræ. On the outside of their land, by the footpath, is the river, and what has happened is that the river has eroded its bank upon that land, with the result that at various points the subsoil which supports the footpath has come down. The local authority, as they could quite properly do, have restored the subsoil which supports the footpath and have raised it to substantially the same level at different points.

The question is whether the expense of doing that work is cast upon the landowners, the appellants, by the terms of s. 30. In my opinion it is not. If the matter were confined to the question of the river alone, I think that the difficulty of supporting this order would be insuperable. The appellants are not the owners of the stream within the meaning of s. 30, as I will point out presently. What they do own is the land ad medium filum and the bank. I am not surprised that Mr. Macmorran put his case in the way he did. He did not say that the appellants are the owners of the stream, but that they are the owners of the bank on which the path runs, and as that bank has become dangerous to persons using the path it comes within the provisions of s. 30. In my opinion this is not the kind of bank to which s. 30 refers.

This section contains provisions "with respect to the repairing or enclosing of dangerous places"; it does not purport to deal with the responsibility of maintaining a highway. It says that "if in any situation fronting, adjoining, or abutting on any street or public footpath" any one of certain things is dangerous to persons using the street or path for want of repair, protection, or

enclosure, the local authority may act. Those words do not purport to deal with the soil of the street or path, but use the curious word "situation." Some of the things specified would be above the highway and some below, and some might be either above or below. With regard to a "stream," there might be cases where a man had a stream on his private property which required to be maintained in its proper course and might otherwise be dangerous to people using a highway. Then as to a "dam or bank," it is difficult to say whether it is intended to be something above or below the highway. I think that it is intended to be a dam or bank which might be a danger to the highway on which it fronted or abutted. The purview of this section is, in my opinion, perfectly plain, that is, to enable the local authority to protect the people on the street or path from danger from any of the enumerated objects and to give the local authority the new power to do the necessary work and to charge the owner of the dangerous object with the expense.

There is nothing in those provisions which can be said to put upon the landowner the obligation of maintaining the land over which a public footpath runs, and it is not sufficient for the respondents to say that the bank on which this footpath runs is falling away and that therefore there is an obligation upon the owner of the bank to maintain it. There might be such an obligation if the part of the bank which is not the footpath were hanging over the path so that it might come down upon people using the path; such a bank might be a bank fronting or abutting on the footpath which was dangerous to the persons using it. The case of *Carshalton Urban Council* v. *Burrage* (1) is a good illustration. There the chalk pit had, by erosion, come into the strip of land belonging to the defendant and adjoining the highway, and therefore he was bound to fence it under the provisions of this section.

In my judgment this is an attempt to impose upon the appellants the responsibility of maintaining the footpath and the soil upon which it runs, and not of protecting persons using a footpath which has been rendered dangerous to the persons using it by reason of any one of the enumerated things. We

(1) [1911] 2 Ch. 133.

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cannot construe the word "bank" in s. 30 to include the ground over which a public footpath runs; to come within the section a bank must be something which adjoins or fronts or abuts on the path and is dangerous to the persons using the path. Upon the facts of this case the decision of the justices has gone much too far by imposing this liability upon the owners of the land on which the footpath runs, and this appeal must be allowed.

DARLING J. I am of the same opinion. In a sense the piece of land between the footpath and the river is the bank of the Mersey. Unless it can be spoken of as a "bank" it is not within the section at all; but I think that we cannot call it a "bank" in the sense in which the statute uses the word. I am very much inclined to think that the "bank" mentioned in s. 30 is not what we usually call the bank of a river, as when we say a person lives on the banks or has a house on the banks of the Thames, or that he keeps his flocks on the banks of the Danube, or anything of that kind. I think it means some kind of artificial elevation, and that this burden cannot be imposed upon the owners of the land on which the footpath goes because between the footpath and the river there is that which prevents the river from flowing further inland. If one speaks of the bank of the river in that sense, it is a much wider thing; I think it would go beyond the footpath and it might go a mile inland; the bank cannot be limited to the little strip between the footpath and the river. Therefore, on that ground, and on that ground alone, I do not think that the piece of land which serves to prevent the footpath slipping into the river should be called a "bank" at all. Sect. 30 uses the word "repair," and I do not think that is the proper word to use about the natural edge of a river into which the river in the course of time will probably eat deeper and deeper. I do not think that this statute ever intended that the river should be preserved at the width at which it was when that statute was passed, and that this should be done at the expense of the person who happened to own the narrow little bit along the edge of it. If Mr. Macmorran is right, as he most candidly admitted, his reasoning involved this—and this, I think, is a reason for deciding against him—

that it might be necessary that a man owning a very narrow little strip of land between the footpath and the river (because he need not own the soil under the footpath) would be bound to embank that river, just as the Thames is embanked here, to prevent it from eating away its bank and so in time allowing the footpath to slip into the river, or if a footpath ran near an estuary he would be bound to prevent the sea or the river from encroaching on the footpath. To my mind that shews how impossible it is for this Court to construe the section as the justices have construed it, because it might involve this, that if the footpath runs, as many footpaths do, along the top of precipitous cliffs, such as the cliffs at Dover, it would cast upon the owner of the bit of land between the footpath and the edge of the cliff the duty of preserving that cliff from falling into the sea, unless he was fortunate enough to own it at a time when by some great accident of the weather the whole thing, footpath and all, went into the sea; he would not be bound to maintain it if the footpath went with the piece of land between the footpath and the edge of the cliff, but as long as the footpath did not go, no matter how high was the cliff and what was the expense, he would be bound to shore up the whole of it to prevent the sea from eating away the cliffs. I cannot imagine that the Legislature, when it used these words, meant to impose upon landowners any such obligation. The common law never imposed upon them anything like it, and I cannot help thinking that, had it been intended to impose upon them such a burden as this, much plainer words would have been used to shew what the Legislature really intended. For these reasons I think the appeal should be allowed.

PHILLIMORE J. I am of the same opinion. I appreciate the argument of the respondents that one must not look too closely at the common law, because this statute is evidently intended to impose a burden on owners of property which the common law does not impose. As to that, all I say is that we must not take the statute further than it is intended to go. I also appreciate the argument that this is not an attempt to make the owner of the soil repair the footpath. The statute intends to make him either

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repair some structure, something hanging over the road, or to enclose some hollow or slope or other danger, or in some way to protect the public from either of those two dangers either from above or below. But it seems to me that the right construction of this section is that it only applies to artificially constructed dangers, and I think the decision of Neville J. in *Carshalton Urban Council* v. *Burrage* (1) must be taken to proceed on that ground. In that case the chalk pit was artificially constructed. It is true that in process of time nature, acting upon the artificial structure, widened the chalk pit, but the main thing was that the chalk pit was an artificial pit. I think that the only way to look at this matter is to say that this bank is not such a bank, and that the Mersey is not such a stream, as this section contemplates. All the words of the section can be satisfied by treating it as referring to artificial structures. Supposing it relates to artificial structures, even the word "stream" may refer to something artificial, because, although a stream is most likely something which runs through the land of various proprietors and as to which each proprietor has only certain rights, there are other streams which a proprietor may construct according to his own desires; and it may also refer to natural streams which have been diverted in such a way as to make them artificial dangers. At any rate, it seems to me that this case is not within the statute, and that we ought to allow the appeal.

Appeal allowed. (2)

Solicitors for appellants: *Lingards & Hamp, Manchester.*

Solicitors for respondents: *Boote, Edgar, Grace & Rylands, Manchester.*

(1) [1911] 2 Ch. 133.

(2) An appeal to the Court of Appeal was entered, but was subsequently withdrawn before it came on for hearing.

J. H. W.

THE ATTORNEY-GENERAL *v.* MILNE AND ANOTHER.

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Dec. 9, 10, 11.

Revenue—Settlement Estate Duty—Property deemed to pass on Death—Settlement not in Consideration of Money or Money's Worth—Death of Settlor within Three Years—Property passing "under that disposition on the death of the deceased"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 5.

By s. 1 of the Finance Act, 1894, estate duty is leviable upon the principal value of all property, settled or not settled, which passes on the death of the deceased.

By s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include," (*c*) property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were therein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" were omitted therefrom.

By s. 5, "(1.) Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property," a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied.

By a deed, which was made in consideration of natural love and affection, the owner of certain property settled it upon his son for life with remainders over. The settlor died within three years after the execution of the deed. The property came within the class referred to in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and estate duty was paid in respect thereof upon the death of the settlor. The Crown also claimed settlement estate duty under s. 5:—

Held, that the property comprised in the deed was property which by virtue of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, was deemed to have passed on the death of the deceased settlor, that it passed "under that disposition on the death of the deceased" within the meaning of s. 5, and that therefore settlement estate duty was payable in respect thereof.

INFORMATION by the Attorney-General claiming settlement estate duty.

1. By an indenture dated May 20, 1909, and made between Henry Ernest Milne, of Warrenhurst, Weybridge, in the county of Surrey, since deceased, of the first part, John Rothwell Milne of the second part, and the defendants Constance Alice Maud Milne (late the wife and now the widow of the said Henry Ernest Milne) and Nathanael Percy Milne (thereinafter called "the

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trustees") of the third part, after reciting that the said Henry Ernest Milne had transferred the shares and sums of stock mentioned in the schedule thereto (which he deemed to be of the value of 4000*l.*) into the names of the trustees to the intent that the same might be held by them upon the trusts and with and subject to the powers and provisions thereinafter declared and contained concerning the same, it was witnessed in consideration of the natural love and affection of the said Henry Ernest Milne for his son the said John Rothwell Milne and declared as follows:—(Clause 1) that the trustees should either allow the said shares and sums of stock or any of them or any part or parts thereof respectively to remain in the actual state of investment thereof or should at any time or times at the discretion of the trustees (but not without the consent in writing of the said John Rothwell Milne, if he should be then living and the trust thereinafter contained for the payment of the income of the trust fund thereinafter mentioned to him should not then have failed or determined) sell, call in, or convert into money the same or any of them or any part or parts thereof respectively, and invest the moneys produced thereby (the said shares and sums of stock and the moneys and investments from time to time representing the same being thereinafter referred to as "the trust fund"). (Clause 2) that the trustees should pay the income of the trust fund to the said John Rothwell Milne during his life unless and until some act or event should have happened or should happen (other than any provision for advancement made by the said John Rothwell Milne under the power for that purpose thereinafter given to him or any consent to any exercise of any power of advancement under any provision for advancement so as aforesaid made by him or any consent to any exercise of the power of advancement therein expressly given) whereby the said income or any part thereof, if belonging absolutely to him, would become vested in or charged in favour of some other person or persons or a corporation, but so nevertheless that any such failure or determination of the interest of the said John Rothwell Milne should not affect his right to fully exercise the several powers of appointment given to him, and that in the event of the trust thereinbefore contained for payment of the

said income to the said John Rothwell Milne failing or determining in his lifetime the trustees should (but subject and without prejudice to any provision for advancement and consent to advancement as aforesaid) during the remainder of his life or during such shorter period or periods, either continuous or discontinuous, as they should in their absolute discretion think fit pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others or other of the following objects, namely, the said John Rothwell Milne and his wife (if any) and his children or remoter issue for the time being in existence whether minors or adults and the other persons or person for the time being entitled to or interested whether absolutely, contingently, or otherwise in the trust fund or any part thereof under the trusts therein contained to take effect after the death of the said John Rothwell Milne in such proportions and manner as the trustees should in their absolute and uncontrolled discretion from time to time think proper, and subject to the aforesaid discretionary trust should during such remainder of the life of the said John Rothwell Milne hold the said income or so much thereof as should not be applied under such discretionary trust upon the trusts and for the purposes upon and for which the said income would for the time being be held thereunder if the said John Rothwell Milne were then dead intestate. Provided always that it should be lawful for the trustees (being not less than two in number) at any time or times if in their absolute discretion they should deem it beneficial by deed to dispense wholly or partially with the provision for forfeiture in the case of the life interest of the said John Rothwell Milne as aforesaid, and also by deed to annul as from the date of the deed any forfeiture actually incurred, if incurred within twelve calendar months prior to the date of the deed. (Clause 3) that the trustees should after the death of the said John Rothwell Milne hold the trust fund and the future income thereof in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the said John Rothwell Milne (such children or remoter issue to take vested interests within the period for the time

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being allowed by law having regard to the rule against perpetuities) at such age or time in such shares and in such manner in all respects as the said John Rothwell Milne should from time to time by any deed or by will or codicil appoint, and in default of and subject to any appointment under the power thereinbefore contained in trust for all or any the children or child of the said John Rothwell Milne as therein more particularly mentioned. And it was thereby expressly declared that it should be lawful for the said John Rothwell Milne to appoint unto any wife who might survive him an interest for the term of her life or any less interest in the whole or any part of the trust fund as therein more particularly mentioned. And it was provided that in case the trusts thereinbefore declared and contained concerning the trust fund should fail or determine then subject to the trusts, powers, and provisions therein declared and contained or by law vested in the trustees concerning the trust fund and to every or any exercise of such powers the trustees should hold the trust fund and the income thereof in trust for such person or persons for such purposes and in such manner in all respects as the said John Rothwell Milne should by will or codicil appoint, and in default of and subject to any such appointment then in trust for such of the five then living sisters of the said John Rothwell Milne as therein mentioned. (Clause 4) that it should be lawful for the trustees at any time to raise any part or parts not exceeding in the whole one half of the then expectant or presumptive or vested share of any issue of the said John Rothwell Milne in the trust fund (but with the consent only of the said John Rothwell Milne during his lifetime) as therein more particularly mentioned.

Paragraph 2 set out the schedule to the indenture specifying the shares and stocks comprised therein.

3. The said Henry Ernest Milne died on December 8, 1911.

4. The value of the trust fund subject to the trusts of the said indenture of May 20, 1909, was assessed for the purposes of estate duty at the sum of 3980*l.* 6*s.*, and the sum of 278*l.* 12*s.* 5*d.* was on February 13, 1912, paid by the defendants for estate duty on the said trust fund as on the death of the said Henry Ernest Milne.

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5. In the circumstances hereinbefore appearing settlement estate duty at the rate of two per cent. became under the provisions of the Finance Acts (1) payable on the death of the said Henry Ernest Milne in respect of the property mentioned or comprised in the said indenture of May 20, 1909. The Commissioners of Inland Revenue had caused application to be made to the defendants as the persons accountable for an account and payment of the said duty, but the defendants refused to deliver such account or to pay such duty, and they contended that no such duty was payable.

The Attorney-General on behalf of His Majesty prayed for a declaration that upon the death of the said Henry Ernest Milne settlement estate duty at the rate of two per cent. became payable under the provisions of the Finance Acts upon the principal value of the property mentioned or comprised in the said indenture of May 20, 1909, for an account, and an order for payment of the amount of the said duty.

The answer of the defendants admitted the correctness of the

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty,' at the graduated rates hereinafter mentioned . . . ."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

. . . .

"(c) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom . . . ."

Sect. 5: "(1.) Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified . . . ."

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facts stated in the information, and contended that no settlement estate duty became payable under the provisions of the Finance Acts or otherwise upon the death of the said Henry Ernest Milne in respect of the property mentioned or comprised in the said indenture.

Sir John Simon, S.-G., and *Austen-Cartmell*, for the Crown. Settlement estate duty is payable on the death of the settlor, on the principal value of the property comprised in the settlement of May 20, 1909, under s. 5, sub-s. 1, of the Finance Act, 1894. The settled property passed on the death of the settlor within the meaning of s. 1 of the Act, because by virtue of s. 2, sub-s. 1 (*c*), it comes within the class of property which is deemed to pass on the death of the settlor, who died within three years after the making of the settlement: see s. 59, sub-s. 1, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8). The property also passed "under that disposition" on the death of the settlor within the meaning of s. 5, sub-s. 1, because by s. 2, sub-s. 1 (*c*), the property was deemed to pass on his death. Therefore settlement estate duty as well as estate duty became payable on the death of the settlor. In *Attorney-General* v. *Chamberlain* (1), *Attorney-General* v. *Smyth* (2), and *Lord Advocate* v. *Heywood-Lonsdale's Trustees* (3) under the same sections of the Finance Act, 1894, both estate duty and settlement estate duty were held to be payable, it being assumed that if estate duty was payable settlement estate duty was also payable; and in *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (4) this very point was decided by the Lord Ordinary in favour of the Crown.

J. E. Harman (*Danckwerts, K.C.*, with him), for the defendant. It is not disputed that estate duty is payable under s. 1 of the Finance Act, 1894, because the property comes within the class referred to in s. 2, sub-s. 1 (*c*), and therefore for the purposes of estate duty the property in question is deemed to have passed on the death of the settlor. Settlement estate duty, however, is not payable. Sect. 5 of the Act deals with the case of property

(1) (1904) 90 L. T. 581.
(2) [1905] 2 I. R. 553.
(3) (1906) 8 F. 724; 43 Sc. L. R. 529.
(4) (1906) 43 Sc. L. R. 589.

which is settled by some disposition and which "passes under that disposition on the death of the deceased" to some person not competent to dispose of it. The words "passes on the death" must be read in their ordinary and natural sense. The property here did not pass on the death of the settlor; it passed to his son in his lifetime. Sect. 2, which enacts that "property passing on the death of the deceased shall be deemed to include" certain property, including the property now in question, applies to s. 1, and says that, for the purposes of estate duty under s. 1, property passing on death shall be deemed to include certain classes of property. It has no application to s. 5. Sect. 2 is not a definition section applicable to every section of the Act which deals with property passing on death. As Lord Selborne said in *Robinson* v. *Barton-Eccles Local Board* (1), an interpretation clause of this kind is not meant to prevent the words receiving their ordinary, popular, and natural sense whenever that would be properly applicable. Sect. 5 contemplates a case where a limited interest arises on the death of the deceased. The limited interest here arose during the lifetime of the settlor, and not upon his death. Nor did the property pass "under that disposition on the death of the deceased." It passed "under that disposition" during the lifetime of the deceased. The settlement took effect in the lifetime of the deceased settlor, and it did not therefore operate as a disposition passing the property on his death. This is the view taken of the section in Hanson's Death Duties, 4th ed., p. 128; 5th ed., p. 140; 6th ed., p. 127. The words of the section must be read in their ordinary and natural sense, and if read in that sense this case does not come within them. This is a casus omissus from the Act. The Crown asks the Court to place an equitable construction upon the section so as to bring this case within it, which offends against the rule of construction laid down by Lord Cairns in *Partington* v. *Attorney-General* (2) and followed ever since. [*Dilworth* v. *Commissioner of Stamps* (3) was also referred to.]

Sir John Simon, S.-G., in reply. Sect. 2, sub-s. 1 (*c*), makes

(1) (1883) 8 App. Cas. 798, at p. 801.

(2) (1869) L. R. 4 H. L. 100, at p. 122.

(3) [1899] A. C. 99, at pp. 105, 106.

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this property pass on the death of the deceased settlor within the meaning of s. 5, and the words "under that disposition" in s. 5 were inserted to identify the property and the document of title.

Cur. adv. vult.

Dec. 11. HORRIDGE J. read the following judgment:— The question which arises in this information is whether or not the duty under s. 5 of the Finance Act, 1894, is payable on the property the subject-matter of a settlement the terms of which are set out in paragraph 1 of the information. It is admitted that the property is property in respect of which estate duty is leviable, and it is also admitted that it is settled by the document in question so that it passed to some person not competent to dispose of the property, but it is said that it did not pass on the death of the deceased and that it did not pass under that indenture as a disposition within the meaning of s. 5.

The first question is therefore whether it passed on the death of the deceased. It is admittedly property within the description of s. 2, sub-s. 1 (*c*), and it is on this basis that estate duty as distinguished from settlement estate duty is admitted to be leviable. The argument before me, however, was that s. 2, which makes property within sub-s. 1 (*c*) of that section pass on the death of the deceased, is not applicable to s. 5 of the Act. It clearly is applicable to s. 1, which relates to estate duty, and ss. 1, 2, and 5 are portions of one part of the Act which is called Part I., Estate Duty, and which includes ss. 1 to 24 inclusive. I can see no reason why s. 2 does not apply to s. 5 so as to make the property mentioned in s. 5 pass on the death of the person making the settlement, if that person dies within the three years enacted by s. 59 of the Finance (1909-10) Act, 1910.

The further question, however, remains as to whether or not it passes under the indenture as a disposition within s. 5. Apart from such indenture it would not have passed at all to the person to whom it did pass and who was a person not competent to dispose of the property, and I think the words "under that disposition" are complied with as words identifying the property to be dealt with and the document under which the title is acquired

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in the event of passing on death, which passing is made to take effect by s. 2. The point which I have to decide was involved in the decision of Channell J. in the case of *Attorney-General* v. *Chamberlain* (1) and in the decisions in *Attorney-General* v. *Smyth* (2) and *Lord Advocate* v. *Heywood-Lonsdale's Trustees* (3), but it is quite correct to say that in none of those cases was the point taken. The point, however, was expressly dealt with in the case of *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (4), and the decision of the Lord Ordinary in that case agrees with mine in this case, although I have arrived at the conclusion I have independently of that decision.

Judgment must therefore be for the Attorney-General with costs on the information. I understand it is not desired that any account should be taken, as there is no dispute as to the amount of duty payable.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Rooke & Sons.*

(1) 90 L. T. 581.
(2) [1905] 2 I. R. 553.
(3) 8 F. 724; 43 Sc. L. R. 529.
(4) 43 Sc. L. R. 589.

W. F. B.

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Dec. 18.
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Jan. 13.

LUMSDEN *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Increment Value Duty—Sale of Fee Simple—Mode of Calculation—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 1, 2, 25.

In 1910 the appellant sold the fee simple of a house, subject to tithe of the capital value of 33*l.*, for 750*l.* At the time of the sale the "gross value," that is, the amount which the fee simple of the property if sold in the open market by a willing seller in its then condition free from any charge or burden might have been expected to realize, was 658*l.* On April 30, 1909, and at the date of the sale, the "full site value" was the same, namely, 228*l.* The original "assessable site value" was 105*l.* A deduction of 90*l.* was allowable for capital expenditure on the land.

An assessment of 25*l.* gross increment value duty, under ss. 1 and 2 of the Finance (1909-10) Act, 1910, upon a sum of 125*l.* gross increment value, was made upon the appellant. On appeal, the referee held that no increment value duty was payable:—

Held, that the proper method of calculating the increment value under the Act was to deduct 430*l.*, the difference between the full site value and the gross value, and the allowance of 90*l.*, from the purchase price of 750*l.*, leaving 230*l.* or an excess of 125*l.* over the original site value of 105*l.*; and that, therefore, increment value duty was payable on the sum of 125*l.*

Special Case stated by a referee under the Finance (1909-10) Act, 1910, in a matter of increment value duty.

The appellant, Lumsden, was assessed to increment value duty under ss. 1 and 2 (1) of the Finance (1909-10) Act, 1910, in respect of a house and shop, and a gross duty of 25*l.* was charged in respect of an alleged gross increment value of 125*l.*, and he appealed against the assessment.

The referee by whom the appeal was heard stated his decision and award in the form of a special case for the opinion of the Court. The material paragraphs of the case were as follows:—

(3.) The occasion on which the duty was alleged to become payable was a sale on August 23, 1910, by the appellant of the fee simple of the said dwelling-house and shop to a buyer, who took possession for the purpose of carrying on a business in the shop. The sale was of the property subject to the burden of tithe, which tithe is referred to in the said provisional valuation of the capital value or burden of 33*l.*

(4.) On February 9, 1911, the said dwelling-house and shop

(1) See note on p. 354, post.

(hereinafter called "the property") were provisionally valued under the Act as at April 30, 1909, and this valuation was accepted by the appellant raising no objection within the time prescribed by the Act. The original assessable site value was fixed at 105*l.*

(5.) The consideration for the transfer on sale on the occasion giving rise to the claim was 750*l.*

(6.) At the time of the sale the fee simple of the property if sold in the open market by a willing seller in its then condition free from incumbrances and from any burden, charge, or restriction, other than rates or taxes, might have been expected to realize the sum of 658*l.*

(7.) It was admitted that there had been no variation in the full site value between April 30, 1909, and August 23, 1910, and that the value was 228*l.* on each date. It was also admitted that 90*l.* represented the amount of deduction for roads to be made under s. 25 (4.) (*b*) from the total value to arrive at the assessable site value. The capital value of the tithe was admitted to be 33*l.*

(8.) It was contended on behalf of the appellant that: The increment value is either, (A) the difference between the original assessable site value of 105*l.* (fixed by the said provisional valuation) and the assessable site value on the occasion of the sale, which is in the present case to be taken to be the value of the consideration for the transfer on the sale to Mrs. Stobie subject to the like deductions as are made under the general provisions of Part I. of the Act as to valuation for the purpose of arriving at the site value of the land from the total value, or (B) the difference between the original full site value of 228*l.* and the admitted full site value of 228*l.* on the present occasion when the increment value is to be collected. In order, therefore, to arrive at the result here on the footing of (A) the following considerations must be applied:—

(1.) The fee simple was sold subject to tithe of 33*l.* capital value for 750*l.*, therefore the gross value (which in this case is the fee simple value free from tithe—see s. 25 (1.)) is 783*l.*

(2.) It was admitted the full site value at the time of sale was 228*l.*, the same as in the provisional valuation.

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(3.) Therefore the difference between the gross value and the full site value was 555*l.*

(4.) The sale price gives the total value, viz., 750*l.*, for that was the price subject to tithe.

(5.) Therefore the "assessable site value" is the total value (750*l.*) after deducting (A) the deduction of 555*l.* and (B) 90*l.* attributable to roads.

(6.) The "assessable site value" for calculating the increment duty is 105*l.*, i.e., after deduction from 750*l.*—(555*l.*+90*l.*), i.e., 645*l.*

(7.) There is therefore no increment value.

On the footing of (B) it is also the case that there is no increment value.

It was contended on behalf of the Commissioners of Inland Revenue:—

(1.) That under s. 2 (1.) of the Act the increment value is to be deemed to be the amount, if any, by which the site value of the land on the occasion, ascertained in accordance with the said section, exceeds the original site value of the land as ascertained in accordance with the general provisions of the First Part of the Act.

(2.) That the site value of the land on the occasion was in this case the value of the consideration, i.e., 750*l.*, subject to the like deductions as are made under s. 25 (4.) to arrive at site value of land from total value.

(3.) That the first deduction to be made under and by virtue of s. 25 (4.) (*a*), read with s. 25 (2.) of the Act, is the difference mentioned in s. 25 (2.), i.e., the difference between the gross value and value divested.

(4.) That the gross value of the land being as found by the referee 658*l.*, and the value of the site divested being also as found by him 228*l.*, the difference amounted to 430*l.*

(5.) That there being no other deduction except the deduction for roads, which is found by the referee at 90*l.*, the total amount of deduction is 520*l.*

(6.) That deducting the 520*l.* from the value of the consideration, viz., 750*l.*, the result is 230*l.*

(7.) That this 230*l.* is the site value of the land on the

occasion, arrived at in accordance with the provisions of the Act.

(8.) The increment value duty is exigible on the difference between 230*l.*, the site value on the occasion, and 105*l.*, the original site value of the land as found in the provisional valuation.

The referee decided that the contention of the appellant was correct, and accordingly that he was not liable to pay any increment value duty on the occasion in question.

If the Court should be of opinion that the contention of the Inland Revenue Commissioners was correct, the appellant was liable to pay the increment value duty claimed by the Commissioners.

Sir John Simon, S.-G., and *W. Finlay*, for the Crown.

Danckwerts, K.C., and *W. Allen*, for Lumsden.

[*Herbert's Trustees* v. *Inland Revenue* (1) and *Attorney-General* v. *Till* (2) were referred to.]

The arguments appear fully in the contentions stated in the case and in the judgment.

Cur. adv. vult.

1913. Jan. 13. HORRIDGE J. The question in this case arises in respect of the sale of certain property on August 23, 1910, for 750*l.*, but subject to a tithe rent-charge of the capital value of 33*l.* The question for my decision is upon what basis the property ought to be assessed under ss. 1 and 2 of the Finance (1909-10) Act, 1910.

The case finds that it was admitted that there had been no variation in the full site value between April 30, 1909, and August 23, 1910, and that the value was 228*l.* on the later date. It was also admitted that 90*l.* is the right amount of deduction for roads, to be made under s. 25, sub-s. 4 (*b*), from the total value to arrive at the assessable site value. The capital value of the tithe was admitted to be 33*l.* It is also found in paragraph 6 of the case that at the time of the sale the fee simple of the

(1) 1912 S. C. 948. (2) [1909] 1 K. B. 694, 701; [1910] A. C. 50.

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property if sold in the open market by a willing seller in its then condition free from incumbrances and from any burden, charge, or restriction other than rates or taxes might be expected to realize the sum of 658*l.*, or in other words that under the conditions of s. 25, sub-s. 1, the gross value of the land was 658*l.* The original valuation of the land as on April 30, 1909, must be taken to be correct as it was not objected to.

By s. 1 of the Finance (1909-10) Act, 1910, a duty is imposed to be paid on the increment value of any land. By s. 2, the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land on the occasion on which increment value duty is to be collected, as ascertained in accordance with that section, exceeds the original site value of the land as ascertained in accordance with the general provisions of that part of that Act as to valuation. The original site value of the land is, under the provisions of s. 25, sub-s. 4, to be deemed the assessable site value, and there is no dispute that such assessable site value was at the time 105*l.* The contest before me was with regard to the manner in which the site value is to be ascertained on the occasion, or in other words what I may call the occasional site value. By sub-s. 2 (*a*) of s. 2 the site value of the land shall be taken to be the value of the consideration for the transfer, subject to the like deductions as are made, under the general provisions of this part of the Act as to valuation, for the purpose of arriving at the site value of land from the total value. Both sides agree that the 90*l.* was a proper deduction, and the dispute was as to what further deduction should be made.

The contention of the Crown was that, under s. 25, sub-s. 4 (*a*), the further amount to be deducted was the same amount as was to be deducted for the purpose of arriving at full site value from gross value, and the gross value was found by paragraph 6 of the case to be 658*l.*, from which, if 228*l.*, the full site value, is taken, a deduction of 430*l.* is arrived at, and that if this 430*l.* and the 90*l.* for roads are deducted from the purchase price of 750*l.* it leaves a figure of 230*l.*, or an excess over the 105*l.* of 125*l.* which was liable to duty.

On behalf of the respondent it was contended that when the

sale in fact takes place the purchase-money is substituted as the actual sum, and that actual sum must be worked into s. 25 in the following manner. The purchase price was said to correspond under s. 25, sub-s. 3, with the total value of the land, which was, it was argued, the market price to be obtained for the land as it was, but in order to arrive at the gross value it was necessary to add the capital value of the tithe rent-charge to which it was subject, making the gross value of the land in this case the sum of 783*l.* It was then said in order to arrive at the deduction to be made under s. 25, sub-s. 4, you must take the agreed full site value of 228*l.* from that sum, leaving the sum of 555*l.*, and this sum of 555*l.* plus the 90*l.*, making together the sum of 645*l.*, when deducted from the purchase-money of 750*l.* gives the value on the occasion 105*l.*, which was the same sum as the original site value.

If the contention of the Crown is well founded, although there has been no increase in the full site value, as stated to be admitted in paragraph 7 of the case, yet there was nevertheless an increment value. In other words, the owner having sold the property for 750*l.* subject to the tithe rent-charge, when the referee finds its gross value which would be free of the tithe rent-charge was only 658*l.*, there was a fund created upon which increment duty could be charged. I do not think I can adopt the argument put forward on behalf of the respondent, as I think it violates the provisions of the Act. Under s. 2 the consideration money is to be subject to the like deductions as are made under s. 25, and in order to introduce the purchase-money as distinguished from the gross value you must first assume that the purchase price is to be substituted under s. 25, sub-s. 3, for the total value of the land, for which I can find no justification, especially as the case distinctly finds that the purchase price exceeds the gross value under s. 25, sub-s. 1, and therefore exceeds the total value under s. 25, sub-s. 3. Even if this is done you have then got to ascertain the gross value by adding the tithe rent-charge to the total value, whereas the section provides that the first thing to be ascertained is the gross value, and the total value is ascertained by deduction from it.

I think the true view is that "like deductions" mean deductions

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to be made by ascertaining under s. 25 the difference between the gross value and the full site value. In this case the amount happens to be the same as would be arrived at by the same calculation in arriving at original site value, but it is only because the gross value and the full site value are found by the case to have been the same both on the occasion of the original valuation and at the time of the purchase. If either the gross value or the full site value had been altered in the meantime the figure for deduction would be correspondingly altered.

In support of the argument of the respondent the following passage in the opinion of Lord Johnston in the case of *Herbert's Trustees* v. *Inland Revenue* (1) was referred to :—"I do not think that the definition of increment value in s. 2, sub-s. 1, can be fairly read without concluding that the statute contemplates, in speaking of 'exceeds,' an excess of value at one point of time over value at another point of time of an actual and practical nature, and not an excess of value of a theoretical or purely mathematical nature. And this is confirmed so far by the fact that s. 2, sub-s. 2, which provides how occasional site value is to be ascertained, makes the basis of that value (in the case of actual transmission at any rate) real value, either actual consideration for transfer on sale or lease, or actual valuation at death, through subjecting that real value to the same deductions as are to be made under s. 25 for the purpose of arriving at original site value." I do not think that this passage means that s. 25, sub-s. 2, provides that the actual sale price is to be imported for all purposes into s. 25 or for the purpose of ascertaining the "like deductions" under s. 2. It is merely referring to the provisions of s. 2, sub-s. 2 (*a*). Even if it means this, it is only an observation made for the purpose of shewing that under the Act the increment duty was imposed on real values and not on a calculation based upon minus figures and is in no way any portion of the direct decision of the Court, and I do not feel that I should be bound to follow it.

It was further contended before me that this statute is a

(1) 1912 S. C. 948, at p. 957.

statute for the purpose of taxing increment arising from the alteration in site value; but if this argument is correct I cannot see why s. 2, sub-s. 2 (*a*), is enacted, because if the purchase-money is also to be introduced as a factor in making the deductions the amount of the purchase-money would be quite immaterial in arriving at the taxable increment, as it would merely be taken in the first place under s. 2, sub-s. 2 (*a*), and then the deduction would be altered by the amount of the purchase price so far as to make the result in no way depend upon the amount of the purchase-money.

Lord Johnston, in the case to which I have referred (1), does use this expression: "I think it was very much this [speaking of the theory of the Act], that the value of bare land, or of land divested of the results of human labour and expenditure, is increased, not by the action of the owner, but by the action of circumstances, and that therefore the State may without injustice exact a share of the increase." But these words do not seem to me, whilst I agree with them to the extent to which they go, to prevent the effect of s. 2, sub-s. 2 (*a*), being to add to the taxable increment the increase produced by fortuitous sale of the site at a price greater than what would be otherwise its full site value.

It was further contended before me that the occasional site value which is referred to in brackets in the last paragraph of s. 25, sub-s. 4, must be the full site value under s. 25, sub-s. 2, as this is the only site value referred to in the section other than assessable site value, and that from this full site value, which in this case is agreed at 228*l.*, the deductions of 90*l.* and 33*l.* must be made, leaving the sum of 105*l.* as the site value on the occasion. I do not think this is correct, as I think the words in brackets merely refer to the provisions as to assessment of occasional site value contained in s. 2.

I think in this case the contention on behalf of the Crown is correct, that you must take the purchase price, and the deductions to be made must be calculated under the provisions of s. 25 without endeavouring to alter this section artificially by introducing the

(1) 1912 S. C. at p. 956.

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purchase price into the calculation under them. I hold that the 125*l.* is liable to pay increment value duty.

Judgment for the Crown.

Solicitor for the Commissioners of Inland Revenue: *The Solicitor of Inland Revenue.*

Solicitors for respondent: *Robinson & Bradley.*

NOTE.—10 Edw. 7, c. 8, s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of 1*l.* for every complete 5*l.* of that value accruing after the 30th day of April, 1909, and—

"(*a*) on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land, in pursuance of any contract made after the commencement of this Act . . . . ,

the duty, or proportionate part of the duty, so far as it has not been paid on any previous occasion, shall be collected in accordance with the provisions of this Act."

Sect. 2: "(1.) For the purposes of this Part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation.

"(2.) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—

"(*a*) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer . . . . ;

subject in each case to the like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value.

Sect. 25: "(1.) For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise.

"(2.) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon.

"(3.) The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold

subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the 30th day of April, 1909, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final.

"(4.) The assessable site value of land means the total value after deducting—

"(*a*) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and

"(*b*) Any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or expenditure of a capital nature (including any expenses of advertisement) incurred bona fide by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture; . . . .

"Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section."

J. H. W.

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Jan. 13, 14.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* MARQUESS OF ANGLESEY, RESPONDENT.

Revenue—Reversion Duty—Surrender of Lease—Grant of New Lease—Benefit accruing to Lessor—Deduction—Compensation payable by Lessor at Determination of Lease—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, c. 8), *s.* 13, *sub-s.* 2—*Revenue Act*, 1911 (1 *& 2 Geo.* 5, *c.* 2), *s.* 3, *sub-s.* 2.

In ascertaining the value of the benefit accruing to a lessor, by reason of the determination of a lease, for the purpose of the reversion duty payable under s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, there is, by sub-s. 2, to be deducted "all compensation payable by such lessor at the determination of the lease."

Two leases, which would have expired respectively in 1968 and 1966, were surrendered by the lessee to the lessor on December 19, 1910, on which date the lessor granted to the lessee a new lease of the hereditaments comprised in the two leases at the same rent for a term expiring in 1979. The new lease was expressed to be made in consideration of the surrender of the two leases. If there had been a surrender of the two leases and no new lease had been granted, the value of the benefits thereby accruing to the lessor would have been, respectively, 395*l.* and 1340*l.* The Commissioners claimed reversion duty on those two sums:—

Held, that the grant of the new lease was compensation payable by the lessor at the determination of the two leases within the meaning of s. 13, sub-s. 2, and that no reversion duty was payable.

APPEAL by the Commissioners of Inland Revenue against the decision of a referee appointed under the Finance (1909-10) Act, 1910.

The facts were as follows:—By a lease dated June 22, 1869, the hereditaments No. 89, High Street, Burton-on-Trent, were demised for a term of ninety-nine years from April 5, 1869, at a yearly rent of 15*l.*; and by a lease dated July 31, 1868, the hereditaments Nos. 91 and 92, High Street, Burton-on-Trent, were demised for a term of ninety-nine years from October 10, 1867, at a yearly rent of 10*l.* On December 19, 1910, these two leases were surrendered by one James Campbell, in whom they were then vested, to the respondent, the person then entitled to the freehold reversion expectant on the determination of the leases.

Upon the surrender of the leases the respondent by a lease dated December 19, 1910, demised Nos. 89, 91, and 92, High

Street, Burton-on-Trent, and two other hereditaments to the said James Campbell for a term of sixty-nine years from April 5, 1910, at a yearly rent of 40*l.* The new lease was expressed to be made in consideration of the surrender of the two leases and of the rent and the lessee's covenants reserved by and contained in the new lease. It did not contain any apportionment of rent as between the various hereditaments thereby demised, but the yearly rent of 40*l.* was in fact made up as follows, namely, 15*l.* in respect of No. 89, High Street, 10*l.* in respect of Nos. 91 and 92, High Street, 10*l.* and 5*l.* in respect of the other two hereditaments.

On May 31, 1911, the Commissioners of Inland Revenue gave notice in writing to the respondent that they had made under s. 13 of the Finance (1909-10) Act, 1910 (1), assessments to reversion duty upon him amounting respectively to 4*l.* 17*s.* 1*d.* and to 15*l.* in respect of the benefit accruing to him by reason of the determination on December 19, 1910, of the lease of June 22, 1869, of No. 89, High Street, and of the lease of July 31, 1868, of Nos. 91 and 92, High Street.

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 13:

"(1.) On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value.

"(2.) For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease and of all compensation payable by such lessor at the determination of the lease, exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property), but, where the lessor is himself entitled only to a leasehold interest, the value of the benefit as so ascertained shall be reduced in proportion to the amount by which the value of his interest is less than the value of the fee simple."

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The assessments in respect of 89, High Street was arrived at by the Commissioners in the following manner:—The Commissioners ascertained the total value (as defined for the purpose of the general provisions of Part I. of the Finance (1909-10) Act, 1910) as on December 19, 1910, of the hereditaments No. 89, High Street, Burton-on-Trent, at 840*l.*, and the total value of the said hereditaments as at the time of the grant of the lease of June 22, 1869 (on the basis of the rent reserved and payments made in consideration of the said lease), at 375*l.* They determined that no part of the total value of 840*l.* was attributable to any works executed, or expenditure of a capital nature incurred, by the lessor during the term of the said lease, and that no compensation was payable by the lessor at the determination of the lease. They accordingly ascertained the value of the benefit accruing to the lessor by reason of the determination of the said lease at 465*l.*, being the amount by which the sum of 840*l.* exceeded the sum of 375*l.* Duty at the rate of 1*l.* for every complete 10*l.* of the said sum of 465*l.* amounted to 46*l.*, which being discounted as provided for by s. 3, sub-s. 2, of the Revenue Act, 1911, gave a sum of 4*l.* 17*s.* 1*d.* as the net reversion duty for which the Commissioners claimed that the respondent was liable on the aforesaid determination of the said lease. (1)

On June 27, 1911, the respondent notified his intention of appealing to a referee against both assessments on the grounds (inter alia) that the total value of the premises 89, High Street, Burton-on-Trent, at the determination of the lease was not 840*l.* and that the correct amount of duty was not 4*l.* 17*s.* 1*d.*; that no benefit in fact accrued to the lessor by reason of the determination of the leases; and that no deduction had been allowed under s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, or otherwise, in respect of the value of the new lease granted to the lessee,

(1) It is unnecessary to refer further in this report to the assessment in respect of Nos. 91 and 92, High Street. It was made in the same manner as the other assessment, the only difference being in the figures, and the grounds of objection to it were the same. The value of the benefit accruing to the lessor as ascertained by the Commissioners was 1340*l.*

which was in effect compensation to the lessee for the determination of the old ones.

The appeal was heard by Mr. Daniel Watney, the referee duly authorized in that behalf, who gave the following decision in respect of each assessment:—"That no benefit has accrued to the lessor by reason of the termination of the lease, and that the grant of the new lease must be taken as compensation payable by the lessor."

At the hearing before the referee it was either proved or agreed that the total value as on December 19, 1910, of the hereditaments 89, High Street was 770*l.* and not 840*l.* (which made the value of the alleged benefit accruing to the lessor 395*l.* instead of 465*l.*); that no part of the total value as on December 19, 1910, of either of the hereditaments was attributable to works executed or expenditure of a capital nature incurred by the lessor during the terms of the leases of June 22, 1869, and July 31, 1868; and that, unless the grant of the new lease was to be taken as compensation payable by the lessor at the determination of the two old leases, no such compensation was in fact so payable.

The Commissioners of Inland Revenue appealed against the decision of the referee.

Austen-Cartmell (*Sir John Simon*, *S.-G.*, with him), for the appellants. Upon the true construction of the Finance (1909-10) Act, 1910, and the Revenue Act, 1911, the grant of the new lease cannot be taken to be compensation payable by the lessor on the determination of the old leases, within s. 13, sub-s. 2, of the Act of 1910. The word "compensation" in that section means money which is payable by the lessor on the determination of a lease, either under the terms of the lease itself or by custom or statute. It does not include the consideration given by the lessor to the lessee for the surrender of the lease, whether that consideration be money or the grant of a new lease. This contention is supported by the language of s. 14, sub-s. 3, of the Act of 1910, which authorizes the Commissioners, where a lease is determined by agreement before the expiration of the term, to make an allowance in respect of the reversion

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duty payable. If the respondent's contention is right there would have been no need for that provision because no reversion duty would be payable, and therefore there would have been no question of making an allowance. It is true that s. 14, sub-s. 3, has now been repealed by s. 3, sub-s. 5, of the Revenue Act, 1911, but that fact does not affect the argument as to the meaning of s. 13 of the Act of 1910. The Commissioners have properly made the allowance provided for by s. 3, sub-s. 2, of the Act of 1911, which now takes the place of s. 14, sub-s. 3. Under s. 13 the reversion duty is payable on a certain value which is to be ascertained in accordance with certain fixed rules subject to deductions. The deductions from total value which have to be made under s. 13, sub-s. 2, are all in respect of matters which are included in the total value, and do not include something which is entirely outside the total value, such as the consideration for the grant of a new lease.

Danckwerts, *K.C.*, and *Micklethwait*, for the respondent. By s. 3, sub-s. 5, of the Revenue Act, 1911, s. 14, sub-s. 3, of the Act of 1910 "shall cease to have effect and shall be deemed never to have had effect." Therefore it cannot now be looked at for the purpose of construing s. 13. But in any event it does not assist in the decision of this case, for the words "a fresh lease of the lands is then granted" shew that it was only intended to apply where the new lease was granted of the same land as was comprised in the old lease, which is not the fact here, and also the use of the word "then" shews it was only intended to apply where the new lease was not contemporaneous with, but subsequent to, the determination of the old lease. Sect. 3, sub-s. 2, of the Revenue Act, 1911, has no reference to the granting of a new lease in consideration of the surrender of an existing lease, and only applies to a case where a lease determines on the vesting of the lessor's and lessee's interest in the same person. With regard to s. 13, sub-s. 2, of the Act of 1910, the section does not say that the compensation must be payable under the terms of the lease, and it is to be payable not *on* but *at* its determination. There is therefore no reason for giving so limited a meaning to the word "compensation" as is contended for by the appellants. It is clear that the surrender of the old

leases was the consideration for the grant of the new lease, and the position is exactly the same as if the lessor had paid to the lessee the appropriate sum of money for the surrender and the lessee had repaid that sum as consideration for the grant of a new lease, in which case it would be impossible to contend that reversion duty was payable.

Austen-Cartmell replied.

Cur. adv. vult.

Jan. 14. HORRIDGE J. read the following judgment:—In this case there were on December 19, 1910, two leases existing under which James Campbell was lessee, one at a rental of 15*l.* of No. 89, High Street, Burton-on-Trent, which would expire on August 4, 1968, and the other at a rent of 10*l.* of Nos. 91 and 92, High Street, which would expire on October 9, 1966.

On December 19, 1910, a new lease was granted by the respondent to James Campbell of Nos. 89, 91, and 92, High Street, together with other property, for a term which would expire on April 4, 1979.

It is agreed that so far as these properties are concerned the portion of the rent applicable to them was the same amount as the two rents of 15*l.* and 10*l.* In the lease it is recited that it was granted in consideration of the surrender of the two existing leases. It is also agreed that if the two previous leases had been surrendered without any new leases being granted, the value of the benefit accruing to the lessor by reason of the determination of the leases would have been the sums of 395*l.* and 1340*l.*

The Crown claim that under s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, and s. 3, sub-s. 2, of the Revenue Act, 1911, they are entitled to a duty of such an amount as regards each of such sums as would with compound interest at the rate of 4 per centum per annum for the residue of the respective terms for which the surrendered leases were granted produce in each case one-tenth of such amounts.

The referee in this case has decided that no benefit has accrued to the lessor by reason of the termination of the lease and that the grant of the new lease must be taken as compensation payable by the lessor.

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The question whether or not the Crown are entitled to the duty they claim depends upon the construction of the words in s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, "subject to the deduction of all compensation payable by such lessor at the determination of the lease."

The contention of the Crown was that the agreement by the respondent to grant a new lease of the premises at the same rent in consideration of the surrender of the two leases was not compensation payable by such lessor at the determination of the lease, and that the only compensation which could be properly deducted from the total value at the time of the surrender was compensation either payable under the provisions of the lease itself or compensation recoverable in respect of the lease owing to custom or statute. It is quite clear in this case that the only benefit, if any, which the respondent received by the surrender was the fact that he was enabled to include several properties in one lease of a somewhat longer duration than that of either of the existing leases on the property in question.

Upon the best consideration I can give to s. 13, sub-s. 2, I do not see anything which compels me to give so narrow a meaning to the words "compensation payable by the lessor on the determination," and if instead of granting a new lease the respondent had agreed to pay in cash the two sums which were the increased value to the lessee of his holdings and the lessee had then paid that sum back as the consideration for the new lease, I think the respondent would have been entitled to say that the sum he paid for surrender was compensation payable on the determination of the leases. I think the new lease which represented the terms upon which the surrender was obtained would stand on the same footing and was rightly treated by the referee as compensation payable on the determination of the lease. Mr. Austen-Cartmell argued before me that the repealed sub-s. 3 of s. 14 provided for one case where a new lease was granted, and that, therefore, as in that selected case an allowance was made, it was clear that duty was payable, although a fresh lease was granted. I think this must entirely depend upon whether or not, where the new lease is the consideration for the surrender, the rent of the new lease is such as to shew, as it does in this case, that the

reversioner obtained no benefit from the surrender. He also relied upon s. 3, sub-s. 2, of the Revenue Act, 1911, as shewing that there was a provision for diminishing the payment to be made when the lease is determined by the vesting of the lessor's interest and the lessee's interest in the same person before the expiration of the term, but even if this section is applicable to a case of surrender of a lease, as to which I express no opinion, the section only operates when there is reversion duty payable, and the question really comes back under s. 13, sub-s. 2, as to whether or not reversion duty is payable.

In my view the referee was right in this case in holding that within s. 13, sub-s. 1, no benefit accrued to the respondent because within s. 13, sub-s. 2, the grant of the new lease must be taken as compensation payable by the respondent.

This appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Williams & James.*

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Dec. 12, 13, 14.

[IN THE COURT OF APPEAL.]

REVERSION FUND AND INSURANCE COMPANY, LIMITED *v.* MAISON COSWAY, LIMITED.

Principal and Agent—Money borrowed by Managing Director of a Company on its Behalf—Absence of Authority to borrow—Debts of Company paid with Money borrowed—Knowledge by Lender of Absence of Authority—Equitable Right of Lender to recover.

The managing director of the defendant company was, by the terms of his appointment, prohibited from borrowing money on behalf of the company, unless specially authorized so to do by the company. Without authority from the defendant company, he borrowed money on its behalf from the plaintiff company, which money he applied in discharging existing legal debts of the defendant company. The plaintiff company knew through its officers, when the advance was made, that the managing director of the defendant company had no authority to borrow on its behalf:—

Held (reversing the judgment of Scrutton J.) by Buckley L.J. and Kennedy L.J., Vaughan Williams L.J. dissenting, that the plaintiff company was entitled to recover from the defendant company the amount advanced notwithstanding its knowledge as before mentioned.

Bannatyne v. *MacIver* [1906] 1 K. B. 103, commented upon and explained.

Appeal from the judgment of Scrutton J. in an action tried by him without a jury.

The action was for money payable by the defendant company to the plaintiff company in respect of money lent by the plaintiff company to the defendant company, or, in the alternative, in respect of money received by the defendant company for the use of the plaintiff company.

At the time of the after-mentioned transaction, the same person acted as secretary of both companies. One Morhange was managing director of the defendant company, which carried on a dressmaking business. The defendant company had by its memorandum and articles of association power to borrow for the purposes of its business, but Morhange was by the terms of his appointment prohibited from pledging the defendant company's credit except so far as he might from time to time be authorized so to do by the company, generally, or in any

particular case. The defendant company was being pressed for payment of rent due in respect of the premises upon which its business was carried on, for which rent a judgment had been obtained, and by other claims. For the purpose of obtaining funds to meet these claims, without authority from the defendant company, Morhange, who was largely interested in that company, negotiated through the above-mentioned secretary an advance of money from the plaintiff company. The advance was made by cheques signed by two managing directors of the plaintiff company. Scrutton J. found that, at the time when the advance was made, the above-mentioned secretary and directors knew that Morhange was not authorized to borrow on behalf of the defendant company. The money so obtained was applied by Morhange in payment of a portion of the rent in arrear, a year's salary due to the secretary, and other existing legal debts of the defendant company. The parties to the above-mentioned transaction appeared to have contemplated that, under the circumstances, a resolution would be subsequently passed by the board of directors of the defendant company sanctioning the transaction and adopting the loan as a loan to the defendant company. In the result, however, no such resolution of the board of directors was ever passed, and it did not appear that the board of directors ever did anything by way of adoption or ratification of the transaction.

The case set up by the plaintiff company was that the advance was intended to be a loan to the defendant company, and that, the money advanced having been applied in discharge of the defendant company's legal debts, the plaintiff company was entitled in equity to recover the amount of it from the defendant company, notwithstanding the fact that Morhange had no authority to borrow the money on behalf of that company.

Two grounds of defence were set up on behalf of the defendant company, one of which raised a question of fact and the other a question of law. They were, in substance, as follows: (1.) that the true inference from correspondence put in and oral evidence was that the money advanced was intended to be a loan made temporarily to Morhange in his individual capacity, and not to

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the defendant company, pending the contemplated adoption of the transaction by the defendant company as a loan to the company; (2.) that, even if that were not so, the facts shewed that the plaintiff company through their officers had notice, when the advance was made, that Morhange had no authority to borrow on behalf of the defendant company, and that the judgments in *Bannatyne* v. *MacIver* (1) shewed that under those circumstances the plaintiff company was not entitled to the equitable right which it sought to set up.

Scrutton J. found on the facts that the advance was a loan to Morhange in his individual capacity, but held that, even if that were not so, and the advance was intended to be made to the defendant company, inasmuch as the plaintiff company knew, when the advance was made, that Morhange was not authorized to borrow money on behalf of the defendant company, on the authority of *Bannatyne* v. *MacIver* (1), the plaintiff company was not entitled to recover. He therefore gave judgment for the defendant company. (2)

A. Neilson, for the plaintiff company. The proper inference from the evidence in this case is that the advance was intended to be a loan to the defendant company. Morhange clearly had authority as managing director to pay out of the funds in his hands the business debts of the company. Under these circumstances the case is one for the application of the doctrine which was acted on in *In re Cork and Youghal Ry. Co.* (3) and a series of subsequent cases, and applied in *Bannatyne* v. *MacIver* (1) to the case of an agent borrowing on behalf of a principal

(1) [1906] 1 K. B. 103.

(2) It will be understood that the statement of the facts in the text is a summary of the facts so far as material to the point of law in respect of which the case is reported. It has not been thought necessary to set out the correspondence and details of the oral evidence on which the question of fact depended as to whether the advance was intended to be a loan to Morhange in his individual capacity or a loan to the defendant company. In point of fact the advance made exceeded by a few pounds the amount applied in payment of the defendant company's debts, but the plaintiff company's counsel abandoned any claim to the balance over and above that amount, and it has not been thought necessary to encumber the report by details as to the figures.

(3) (1869) L. R. 4 Ch. 748.

without authority money which he applied in paying the principal's debts. It is true that, in the last-mentioned case, Romer L.J., before enunciating the principle applicable to such cases, does mention the fact that there the lender believed that the person acting as agent had authority to borrow on behalf of the principal; but, having regard to the previous authorities, he could not have meant to treat that fact as essential to the applicability of the principle. So far as it went, it was a fact in the plaintiff's favour, and the Lord Justice probably referred to it merely as an incidental fact, constituting the case an a fortiori case for the application of the principle. The existence of knowledge that the agent had no authority to borrow is quite irrelevant to the equitable doctrine in question. [He also cited *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1); *Baroness Wenlock* v. *River Dee Co.* (2); *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3); *Reid* v. *Rigby & Co.* (4)]

Schwabe, for the defendant company. The learned judge was right in holding, upon the evidence, that the money was advanced as a loan to Morhange in his individual capacity. If that was so, obviously the plaintiff company cannot recover the money from the defendant company.

But, even on the assumption that the advance was intended to be a loan to the defendant company, the equitable doctrine relied upon by the plaintiff company does not apply in this case. Both Collins M.R. and Romer L.J. in *Bannatyne* v. *MacIver* (5) clearly thought that absence of knowledge by the lender that the agent had no authority to borrow money for the principal was essential to the applicability of that doctrine. Romer L.J. distinctly states the fact that the lender believed that the agent had authority to borrow as one of the elements of the legal proposition which he stated. At common law clearly, Morhange having no authority to borrow on behalf of the defendant company, the plaintiff company would have no right of action against the defendant company any more than they would have if they voluntarily,

(1) (1882) 22 Ch. D. 61.
(2) (1887) 19 Q. B. D. 155.
(3) [1899] 1 Ch. 440.
(4) [1894] 2 Q. B. 40.
(5) [1906] 1 K. B. 103.

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without any request by the defendant company, paid the debts which were discharged in this case. In the cases cited in which the equitable doctrine relied upon by the plaintiff company was applied where companies borrowed in excess of their borrowing powers, it was the company itself that borrowed money which it applied in discharging its debts. In cases like *Bannatyne* v. *MacIver* (1) and the present case, the person who borrowed as agent had no authority to borrow for the supposed principal. In such a case it would be inequitable that he and the lender who knew that he had no authority to bind his supposed principal should in effect be allowed by their action to impose upon the principal that very liability which the agent was forbidden to impose upon him. [He also cited *Lord Gallway* v. *Mathew*. (2)]

A. Neilson in reply.

VAUGHAN WILLIAMS L.J. This is to my mind a difficult case. As regards the question of fact involved, Scrutton J. has found that in point of fact the advance made by the plaintiff company was intended to be a loan to Morhange in his individual capacity, and not to the defendant company. [The Lord Justice then discussed the evidence, and expressed his opinion that, though there was evidence both ways, on the whole the evidence in favour of the finding of fact arrived at by Scrutton J. preponderated, and, therefore, that finding ought not to be disturbed. He then proceeded as follows:] But Scrutton J. further held that, even if he were wrong in holding that the money was borrowed by Morhange in his individual capacity, and not as representing the defendant company, still the claim of the plaintiff company failed on the ground that they knew, at the time of making the advance, that Morhange had no authority to borrow on behalf of the defendant company. He relied in support of that conclusion on a passage in the judgment of Romer L.J. in *Bannatyne* v. *MacIver* (1), which I will read. It is as follows: "I think this case is governed by the general principle which I am about to state. That principle is one that is well recognized in the present day; and is binding upon us. Where money is borrowed on behalf of a principal by an agent,

(1) [1906] 1 K. B. 103. (2) (1808) 10 East, 264.

the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal." To my mind the Lord Justice was there laying down what he considered to be the essential elements of the general principle which he stated to be then well recognized; and, when one looks at the facts of that case, it appears to have been absolutely necessary that he should lay down what was the general principle applicable, and, therefore, what he said, in so doing, cannot be considered, I think, as a mere obiter dictum, which we are entitled to disregard and treat as not binding upon us. He proceeded as follows: "That limitation, and its true bearing upon the position of the lender, shewing that he is not exactly in the position of a person who is entitled to stand in the shoes of the creditor in all respects and therefore entitled to the benefit of any securities of the creditor paid off, is clearly put in the decision of the case of *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1), which has been cited in the course of the argument. It was suggested by counsel for the defendants that the principle is limited to the case of agents of limited companies, because the directors are their agents purporting to borrow on behalf of their company, whereas by the constitution of the company the borrowing is unauthorized and cannot be validly made. I need scarcely point out that there is no reason why the principle should be limited to companies, and, indeed, if one comes to think of it, the case of such companies as are referred to would be a more difficult case to which to apply the principle than the ordinary case of principal and agent. When directors of a company purport to borrow on behalf of a limited company, the proposed lender might well be supposed to have put upon him the obligation of inquiring into the position of the company and seeing whether the directors are under the circumstances authorized to borrow; and a company, on whose behalf a

(1) [1899] 1 Ch. 440.

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loan is purported to be effected, cannot in any sense be bound where, by its constitution, it cannot borrow, and a person might well be supposed to be put upon inquiry to see whether the company is in the position of a private principal, for no one can say that a person lending money to a private principal through an agent has notice that the principal cannot borrow. The case of money lent to such a principal through an agent, where the agent has no authority to borrow on behalf of his principal, seems to me to be an a fortiori case." I find also in the judgment of Collins M.R. in the same case that he says this: "A time came when he"—that is one Hudson who was the agent who borrowed in that case—" had used all the money available at the bank, but there were pressing demands in relation to the branch business, and he borrowed money from the plaintiff, telling him that the money was required for the purposes of the firm, and the plaintiff lent it under the impression that it was for the use of the firm, and had no knowledge of Hudson's want of authority to borrow money." I think it may be inferred from that last sentence that Collins M.R. thought that, if the lender had had knowledge of Hudson's want of authority in that case, he could not have availed himself of the equity which is generally open to those from whom money has been borrowed without authority by a person purporting to act as agent on behalf of a principal, where that money has been applied in discharge of the supposed principal's debts. That is how Scrutton J. also looked at the matter. Having interposed those quotations from the judgments in *Bannatyne* v. *MacIver* (1), I will now read what Scrutton J. said. As I have already stated, after dealing with the question of fact whether the advance was intended to be a loan to Morhange in his individual capacity or to the defendant company, and deciding that it was intended to be a loan to Morhange, he further decided that, if he was wrong in that conclusion, and the advance was intended to be a loan to the defendant company, even so, the claim of the plaintiff company failed on the ground that they knew that Morhange had no authority to borrow money on behalf of the defendant company, and, in support of that view, he relied on the passages which I have read from

(1) [1906] 1 K. B. 103.

the judgments in *Bannatyne* v. *MacIver*. (1) He said: "But as it is possible that other people may take a different view of the transaction from that which I take, I will deal with the case now on the supposition that I am wrong, and that the loan was really intended to be a loan to the defendant company. If so, the claim in respect of money lent in the writ fails, because Morhange had no authority to borrow on behalf of the defendant company. But the second claim in the writ proceeds on the view that, although there may have been no authority to borrow on behalf of the defendant company, yet, the money borrowed having in fact been used in discharging the debts of the defendant company, the principle is applicable which has been established by a series of authorities from *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (2) and *Baroness Wenlock* v. *River Dee Co.* (3) down to *Bannatyne* v. *MacIver* (1), namely, that, if the moneys borrowed were used for the purpose of paying the debts of the defendant company, then, although the person who borrowed had no authority to borrow, nevertheless, on principles of equity the lenders are entitled to recover from the defendant company the amount so employed in discharging their debts. To that it is answered by the defendant company's counsel that the doctrine only applies when the lender did not know that the borrowing was unauthorized, and he cited in support of that contention the principle of law as stated by Romer L.J. at the commencement of his judgment in *Bannatyne* v. *MacIver*. (1) In that case it was found as a fact that the plaintiff lent the money under the impression that it was for the use of the firm, and did not know that the manager who borrowed the money had in fact no authority to borrow. Collins M.R. in his judgment, while stating that as a fact, says nothing expressly in his judgment about its being an essential fact, but Romer L.J., in stating the general principle, which he states as being one well recognized as binding, does say, 'Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorized, or ratified, or adopted by the principal, then, although the principal

(1) [1906] 1 K. B. 103. (2) 22 Ch. D. 61.
(3) 19 Q. B. D. 155.

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cannot be sued at law, yet, in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.' Mathew L.J. concurs without stating specifically the ground of his concurrence. In my view I am bound by that statement of law in the Court of Appeal, and I hold, therefore, following that case, that it is necessary that the lender should not be aware in fact of the absence of authority of the person acting for the borrower. The secretary of the defendant company in this case admitted that he and the managing directors of the plaintiff company who signed the cheques were all aware that the managing director of the defendant company had no authority to borrow on behalf of that company, and, if so, I am bound by this decision of the Court of Appeal." On the two grounds, therefore, first that the loan was to Morhange as an individual, and, secondly, that, if it was intended to be a loan to the defendant company, the lenders knew that Morhange had no authority to borrow on behalf of that company, Scrutton J. held that the plaintiff company was precluded from recovering from the defendant company, although the money was applied in discharging the debts of that company. In my opinion the judgment of Scrutton J. was right and should be affirmed.

BUCKLEY L.J. There are raised in this case two questions, the one of fact, interesting only to the parties concerned, the other of law, which is of general interest. Both questions, I think, should be resolved in favour of the plaintiff company.

The question of fact is whether the advance of money made by the plaintiff company in this case was a loan to Morhange personally, or was a loan to the defendant company. [The Lord Justice discussed the evidence in the case, and stated his reasons for thinking that the advance was not a loan to Morhange in his individual capacity, but was intended to be a loan to the defendant company. He then proceeded as follows:] For these reasons I arrive at the conclusion that the advance was not a loan to Morhange as an individual, but was a loan to the defendant company.

The question of law is this. The defendant company had under its memorandum and articles of association power to borrow, but that power did not come into active existence until the board of directors passed a resolution for its exercise. The directors never passed any such resolution, and Morhange had no authority to borrow money on behalf of the defendant company. Under these circumstances it becomes necessary to consider the effect of the case of *In re Cork and Youghal Ry. Co.* (1) and subsequent cases of the same class that were cited in argument. The following propositions result, I think, from those cases. First, if a corporation which has no power to borrow, or has exhausted its power of borrowing, does, nevertheless, borrow or purport to borrow, then such borrowing, being ultra vires, creates neither at law nor in equity any debt for money lent. But, secondly, if such a corporation, having incurred debts, procures from some one, who is willing to find it, money which it employs in paying off those debts, that is a legitimate operation, and the transaction is not ultra vires: for, to the extent to which the money found by the lender is applied in discharging the debts of the corporation, there is, in effect, no further borrowing, because the money is employed in discharging debt, and there is therefore no increase of the corporation's indebtedness. And thirdly in that class of case knowledge by the person advancing the money of the absence of authority to borrow is not material. For under such circumstances there is, in substance, no borrowing; there is merely the replacement of one debt by another of the same amount. The existence or non-existence of borrowing power is, therefore, not material, and, consequently, knowledge as to its non-existence is not material.

The contrary of the last proposition is said to be involved in certain words used by Collins M.R. and Romer L.J. in *Bannatyne* v. *McIver*. (2) I must examine that case, but, before doing so, I will refer to the earlier authorities. In cases like *In re Cork and Youghal Ry. Co.* (1) the ground of the decision was that the company were doing what they had power to do, and were not, in substance, exercising a power of borrowing. Under such

(1) L. R. 4 Ch. 748. (2) [1906] 1 K. B. 103.

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circumstances knowledge on the part of the person advancing the money that they had no power to borrow cannot be material. The cases in which this equitable doctrine has been applied are numerous. I do not propose to go through them in order to prove a negative. I am going to read passages from the judgments of three eminent judges, namely, Lord Hatherley L.C., Lord Selborne L.C., and Lord Lindley. If a correct statement of the law on this subject is not to be found in their judgments, I do not know where to look for it.

In the case of *In re Cork and Youghal Ry. Co.* (1) the facts were as follows. The borrowing powers of the railway company were limited to the sum of 131,000*l.* In June, 1862, the company had issued mortgages for the whole of that 131,000*l.* One D. L. Lewis had been financing the company from April, 1861, and had advanced them moneys upon bills accepted by them, which moneys were applied in discharging liabilities of the company. In August, 1862, the borrowing powers of the company being then exhausted, he represented to the directors that he had great difficulties in renewing the company's bills, and that, if the company would issue to him Lloyd's bonds, he would be able to raise money upon them with greater facility, and would be able to supply the company with funds. The directors accordingly issued and gave to him Lloyd's bonds for various sums. The question in the case was whether those bonds were valid. Lewis had financed the company for a considerable time. He wanted documents on which he could get money. He obviously must have known that the borrowing powers of the company were exhausted, for otherwise he would have asked for mortgages by way of security. Lord Hatherley L.C. in giving judgment speaks of him as having "full knowledge of all the circumstances." Lewis parted with the Lloyd's bonds to various persons, and claims were made by the holders. Mr. Jessel in reply said, "These claimants do not come here simply as holders of the bonds. They do not attempt to say that they were ignorant of the mode in which the bonds were issued." Lord Hatherley L.C. in giving judgment said (2): "Then comes the question whether the present holders can be said to be entitled, under any circumstances, to claim

(1) L. R. 4 Ch. 748. (2) L. R. 4 Ch. 760.

payment upon these bonds. Now, first, it was said by Mr. *Jessel* that, taking these bonds at the best as a chose in action, even taking them to be that which they really are, a mere acknowledgment of a debt due apparently on a legitimate ground, those who took them must be exactly in the same condition as Mr. *Lewis*, the original holder, was in; and, therefore, if Mr. *Lewis*, the original holder, could not recover on account of the position in which he was placed, with a full knowledge of all the circumstances, and of the manner in which the company had proceeded for the purpose of raising money, then no more could the holders of these choses in action be able to recover, nor could they be entitled to place themselves in a better position than he was in. That would be so, if, as between Mr. *Lewis* and the company, there were really no debt at all, or that this was all a mere sham, and that the directors had not in any way borrowed the money, or authorized the borrowing of the money, and had not been in any way parties to the transaction, or that the company had been in no way parties to the transaction. But if the money was really applied for the legitimate benefit of the company, can it be possible that the company can hold this money as a surplus which is directed to be paid to them under the Act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate; and, although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised, still they are instruments issued for the express purpose of inducing others to give faith and credit to Mr. *Lewis*, as being a person to whom money was owing for the legitimate purposes of the company. And the money having been de facto so applied to the legitimate purposes of the company, is it possible that the company should be allowed to derive the benefit of all the expenditure which has been thus incurred, and claim the surplus for the benefit of the shareholders? Can the shareholders be allowed to say to the bondholders, 'It is true that the debts have been cleared off by means of your money, but you are not the persons who have cleared

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them off, and you are not to receive the benefit of it, for we are the persons to receive the benefit?' The proper course to be taken seems to me to be this: that, so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that the bondholders stand as assignees of the debts, which, no doubt, have not actually been assigned, but it has been represented by the directors that the persons who lent their money on these acknowledgments were lending their money for the purpose of clearing off the debts; in fact that they were to be put in the position of assignees of the debts." To the principle upon which Lord Hatherley decided that case, the question of knowledge by or notice to the person finding the money that there was no authority to borrow has no application. The principle is that, where A. has found money for payment of a debt due from B. to a third person, and the money has been applied to the payment of that debt, A. is entitled to say that B. has had from him that money, because it has been applied in discharge of B.'s debt, and therefore in equity B. owes him the amount of money so applied. That is recognized as being the principle applicable in such cases by Collins M.R. in *Bannatyne* v. *MacIver*. (1)

In *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (2) Lord Selborne L.C., after referring to the equity established in the case of *In re Cork and Youghal Ry. Co.* (3), said: "And I think the consistency of the equity allowed in the *Cork and Youghal Railway Company's Case* (3) with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders may be shewn in this way. The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely

(1) [1906] 1 K. B. 103. (2) 22 Ch. D. 61, at p. 71.
(3) L. R. 4 Ch. 748.

for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity: and, if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." I take that to be a clear statement by Lord Selborne that a company which has no power to borrow can, nevertheless, lawfully place a person who has found money to pay their debt in the position of being a creditor in lieu of the creditor whose debt has been paid with his money.

The last of the three passages to which I wish to refer is from the judgment of Lindley M.R. in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) The expression "subrogation" had been used in some of the cases on this subject; it had been said that the person advancing the money stands in the shoes of the original creditor. Lindley M.R. in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) is pointing out in the passage I am about to read that the expression "subrogation" is not accurately used; that, although the person advancing the money in such cases can say that the company owes him the amount of the debt paid off, he is not entitled to the securities held by the creditor for the debt. If he stood in the shoes of the creditor, he would be entitled to the securities which the creditor held for the debt. Lindley M.R. says: "Agreeing as I do with Romer J. and with the judgments which my brothers have prepared, and which I have read, I should say nothing more, if it were not that I think I ought to express my dissent from the observations of Fry L.J. on which the appellants base their contention. The decision of the Court in *Baroness Wenlock* v.

(1) [1899] 1 Ch. 440, at p. 446.

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River Dee Co.(1) was quite right, and the judgment in it is very valuable. Fry L.J., who delivered it, was the last person to shut his eyes, and not get at the real facts and substance of any case before him. But, in dealing with that case, he says that 'the Court closes its eyes to the true facts of the case.' I cannot help thinking that this is incorrect. A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of Equity have always looked into the facts to see whether the prohibition has been really disobeyed or not. If it is disobeyed, and to the extent to which it is disobeyed, the prohibition is enforced. But, if the facts when ascertained shew that in truth it has not been disobeyed, the advance of money is treated as not prohibited, although it may at first sight appear to be so because it is beyond the limited amount. The application of the money borrowed shews whether the obligations of the borrowing company have been increased or not, and the extent, if any, to which they have been increased. So far as the money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the Courts have so decided. The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at, but that theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and, as applied to the cases before the Courts, it led to just results. But, if logically followed out in other cases, it leads to consequences not only not foreseen by those who had recourse to it, but to results so startling that I cannot accept the theory as sound."

If, then, as appears from these decisions, the prohibition of borrowing does not apply in such cases, what difference can it make whether the person advancing the money does know or does not know of the absence of authority to borrow? It is true that the company cannot make itself liable as for money lent, but it can, nevertheless, place itself in such a position that a person whose money has gone to pay off a debt

(1) 19 Q. B. D. 155.

of the company can say that he is in equity the creditor of the company, because its debt has been paid with his money, and there was no borrowing because the aggregate liability of the company has not been thereby increased. In these cases it cannot properly be said that he is subrogated to the rights of the original creditor, but he is entitled to recover in equity because there has been substantially no borrowing by the company.

In *Bannatyne* v. *McIver* (1) Romer L.J. aptly expressed the principle applicable in such a case thus: "In equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal. That limitation, and its true bearing upon the position of the lender, shewing that he is not exactly in the position of a person who is entitled to stand in the shoes of the creditor in all respects and therefore entitled to the benefit of any securities of the creditor paid off, is clearly put in the decision of the case of *In re Wrexham, Mold and Connah's Quay Ry. Co.* (2) which has been cited in the course of the argument." In those words the Lord Justice seems to me exactly to state what are the rights of the person who has advanced the money. But it is said that, by the words with which he prefaced that statement, he suggested that the absence of knowledge by the lender that the agent had no authority to borrow, or the belief by the lender that the agent had authority to borrow, was material to the applicability of the principle which he was stating. I do not think that he meant to make that suggestion. The words in question are "Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority, though it turns out that his act has not been authorized, or ratified, or adopted by the principal"; and then he proceeds to state the principle applicable in the words which I before read. It is noticeable that the words used by Romer L.J. are "the lender believing that the agent has authority." Collins M.R. in his judgment says that

(1) [1906] 1 K. B. 103, 109. (2) [1899] 1 Ch. 440, at p. 446.

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the lender "had no knowledge of Hudson's want of authority to borrow money." The two propositions are not identical. Collins M.R. appears to me not to have based his decision upon the fact that the lender had no knowledge of the agent's want of authority, but merely to have mentioned it among the other facts of the case as one circumstance which, if relevant, told in favour of the plaintiff for whom he was about to give judgment. He said nothing to shew that, in the absence of that circumstance, his decision would have been other than it was. He decides the case on the authorities to which I have referred. I think that, in what Romer L.J. said, he was really directing his mind, not to the question of knowledge or no knowledge, but to the distinction between "subrogation" and the doctrine of equity by which, where there is no increase of the debt of the company (the money advanced having been applied in discharging a corresponding amount of debt), a good equitable debt is created. The purport of that portion of his judgment is, I think, to describe the difference between the two things. As I read the words relied upon by the defendant company's counsel, they were not intended by the Lord Justice to form a necessary premiss to the applicability of the principle which he was about to state. He appears to me to have mentioned as one of the facts in the case, which, so far as it went, was in favour of the lender, the fact that he believed that the agent had authority, but I cannot think that he regarded that as an essential fact, or that, in mentioning it, the Lord Justice intended in any way to differentiate the principle applicable in the case with which he was dealing from that which had been applied in *In re Cork and Youghal Ry. Co.* (1) and all the previous cases on the subject. So far as Collins M.R. is concerned, it seems to me impossible, having regard to the previous case of *Reid* v. *Rigby & Co.* (2), that he could have thought that the question whether the lender knew that the agent had no authority to borrow was material. In that case the defendants' manager, one Allport, who had authority to draw on the defendants' banking account for the purposes of their business, but not to overdraw or borrow on their behalf, borrowed

(1) L. R. 4 Ch. 748. (2) [1894] 2 Q. B. 40.

20*l.* from the plaintiff, stating that he wanted it to pay the wages of defendants' workmen, and gave as security for it a cheque signed in his own name by procuration for the defendants. He had overdrawn the defendants' banking account, and he borrowed the money for his own purposes, to replace money of the defendants which he had abstracted, but he paid the money in to the defendants' account at their bank, and used it to pay the wages of the defendants' workmen. In an action on the cheque, the point was taken that the signature being by procuration operated by virtue of s. 25 of the Bills of Exchange Act, 1882, as notice to the plaintiff that the agent had but a limited authority to sign, and the principal would only be bound by the signature, if the agent was acting within his authority. The words of Collins J., as he then was, in giving judgment, are these: "By the terms of s. 25 of the Bills of Exchange Act, 1882, it was apparent on the face of the cheque that the authority of the person signing the cheque was limited." Therefore the claim on the cheque failed. He goes on: "I can entertain no doubt, on examination of the account, that this sum of 20*l.* found its way to the credit of the defendants' account at the bank. The question for our determination is whether the plaintiff can maintain an action to recover that sum. If, instead of giving a cheque, Allport had asked the plaintiff to pay the workmen, and the plaintiff had done so, could not the plaintiff have maintained an action against the defendants to recover what he had paid? I am of opinion that he could; for what he did would have been a payment of the defendants' debt. On that state of facts, therefore, the plaintiff would be entitled to recover. Then does it make any difference that the money went into the bank? I think not; for the effect of the transaction could only be rendered different, if the money were paid in by virtue of some contract which was binding as between Allport and the defendants; but there was no such contract, and there had been no change of position before the defendants knew the facts. The question is whether, now that they have found out Allport's defalcations, the defendants can keep the plaintiff's money." Reproducing the doctrine of *In re Cork and Youghal Ry. Co.* (1)

(1) L. R. 4 Ch. 748.

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in a slightly modified form, he held that, inasmuch as the money had been used in paying the defendants' workmen, the plaintiff was entitled to recover.

I have gone through the authorities at some length because the question seems to me to be one of considerable importance. I cannot find any reason for saying that, in this second class of cases, namely, where the money is borrowed by an agent without authority from the principal, but is applied in paying debts of the principal, the question of knowledge by the lender of the agent's want of authority to borrow is material for the purposes of the equitable doctrine on this subject, the basis of that doctrine being that the transaction is not, in substance, one of borrowing at all. The whole question for the purposes of that doctrine is whether the money found by the lender has been applied so as to relieve the so-called borrower of liability. If and to the extent that it has been so applied, he cannot retain the money. The lender is not entitled to stand in the shoes of the original creditor by subrogation, but the debtor whose debt has been paid with his money is bound to repay that money to him. On the question of law I am of opinion that the plaintiff company is entitled to recover. As regards the fact of knowledge I have no doubt that the officers of the plaintiff company must be taken to have known that the managing director of the defendant company had no authority to pledge the credit of the company for the loan, but I do not think that it is material whether they knew or not.

KENNEDY L.J. [After discussing the question of fact, whether the advance of money by the plaintiff company was a loan to Morhange in his individual capacity or intended to be a loan to the defendant company, and agreeing with the conclusion arrived at by Buckley L.J. on that question, the Lord Justice proceeded to deal with the question of law which thereupon arose as follows:] Then comes the point of law dealt with by Scrutton J. in the second part of his judgment. The judgment which has just been delivered upon this point by one who is more familiar with the doctrine of equity on the subject than myself relieves me from the necessity of expressing my view at any length, but

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I desire to say a few words on the point. The question of law raised by the facts of this case is as follows: it is said that no relief can properly be given in such a case as this to the person who is seeking to recover the money which he has advanced, where he knew, when making the advance, that the person who purported to act as agent for a principal in borrowing the money had no authority so to act. Buckley L.J. has referred in detail to the observations of great authorities on this subject. I understand that the correct statement of the principle applicable in such cases—and I desire for myself to adopt that statement—is that which is expressed by that distinguished author and great lawyer, Lord Lindley, in his works on partnership and companies. In Lindley on Companies, 6th ed., pp. 292, 293, he points out that "one person may be benefited by a contract made by others without being himself in any way bound by it: a loan to A. cannot be recovered from B. simply because the money lent has come into his hands; so, if the directors of a company enter into a contract which is not binding on the company, either upon the ground that the contract is ultra vires, or upon any other ground, the company is not liable on the contract simply because it has had the benefit thereof." He then mentions certain exceptions to the general rule, and afterwards deals with the equitable doctrine sought to be applied in the present case as follows: "From these doctrines there has been developed a rule to the effect that a company is liable in equity to refund money improperly borrowed by its directors on its behalf but in fact bona fide applied in discharging debts or liabilities of the company which could have been enforced against it. At first this equitable doctrine was based on the principle of subrogation, the person making the advance being held entitled in equity to stand in the place of the creditor paid off; and this view prevailed until it was found to lead to consequences which shewed it to be erroneous. The underlying principle in the case of companies which have borrowed in excess of their powers is that, if the money so borrowed has been applied in discharging the legitimate liabilities of the company, such borrowing has not in fact increased the company's liabilities, and the company has not in substance exceeded its powers: in equity therefore the

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advance is treated as valid to the extent of its legitimate application." In Lindley on Partnership, 8th ed., p. 234, Lord Lindley states the law thus: "Where, however, money borrowed by one partner in the name of the firm but without the authority of his co-partners has been applied in paying off debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can shew to have been so applied: and the same rule extends to money bona fide borrowed and applied for any other legitimate purpose of the firm. This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors of the firm whose claims have been paid off by his money; and partly on the right of the borrowing partner to be indemnified by the firm against liabilities bona fide incurred by him for the legitimate purpose of relieving the firm from its debts or of carrying on its business." In the note to this passage he refers to several cases. Among others he refers to *In re National Permanent Benefit Building Society* (1), in which the doctrine in question is very clearly stated by Giffard L.J. in practically the same language as Lord Lindley states it. The present case appears to me to be a strong case for the application of the doctrine so stated, because in some of the cases in which it has been applied the company had no borrowing powers at all, whereas here the company itself had power to borrow, and the most that can be said is that the person acting as agent required special authority to borrow on behalf of the company. That appears to me to be an a fortiori case as contrasted with one in which the company itself had no power to borrow. If the equitable doctrine in question is applicable where a company had no power to borrow, there seems to me to be a stronger case for its application where the only irregularity was that the agent had not been specially authorized to borrow, and he had done so, not for his own benefit, but for the benefit of his principals, who had a right to affirm his action. With regard to the view put forward by the defendant company's counsel as to the effect of the judgments of Collins M.R. and Romer L.J. in the case of *Bannatyne* v. *MacIver* (2) I agree with what has been said by my brother

(1) (1869) L. R. 5 Ch. 309, 313. (2) [1906] 1 K. B. 103.

Buckley. For these reasons I cannot agree with the judgment of Scrutton J. in the Court below either as regards the facts or the law.

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Appeal allowed.

Solicitors for plaintiffs: *Steadman, Van Praagh & Gaylor.*
Solicitors for defendants: *Gery & Brooks.*

E. L.

CROW, APPELLANT *v.* HILLEARY, RESPONDENT.

1912 *Dec.* 13.

Parliament — Registration — Dwelling-house—Rating — "Wholly let out in apartments or lodgings"—Point not taken before Revising Barrister—Parliamentary Voters Registration Act, 1843 (6 & 7 *Vict. c.* 18), *s.* 42—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 7.

Sect. 7 of the Representation of the People Act, 1867, which prohibits the rating to the poor rate of the owners of dwelling-houses or tenements in a parliamentary borough instead of the occupier save as thereinafter mentioned, provides: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

An ordinary dwelling-house in a parliamentary borough was let in two portions, not structurally separated, to two tenants, certain portions, such as the front door and passages, being used in common. Each tenant separately occupied the portion let to him as a "dwelling-house" as defined in s. 5 of the Parliamentary and Municipal Registration Act, 1878, the landlord not residing in the house nor reserving any part thereof for his own use. The tenant of one of those portions, who was not rated in respect of his occupation, claimed to have his name inserted in Division I. of the occupiers' list of voters for the borough as the inhabitant occupier of a dwelling-house:—

Held, that the house, within which the "dwelling-house" occupied by the claimant was contained, was "wholly let out in apartments" within the meaning of s. 7 of the Representation of the People Act, 1867, and that therefore the claimant was entitled to the franchise.

Upon a case stated by a revising barrister the Court is confined to the points of law reserved therein for its opinion, and will not allow a new point of law to be raised.

CASE stated by the revising barrister for the borough of West Ham.

At a Court held for the purpose of revising the lists of voters

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for the parliamentary borough of West Ham (North Division) and the burgess lists for the municipal borough of West Ham the appellant, Walter George Crow, and 124 other persons (whose names were set out in the schedule to the case) claimed to have their names inserted in Division I. of the occupiers' list of electors for the parliamentary borough of West Ham (North Division) and in the list of burgesses for the municipal borough of West Ham.

The qualification in respect of which each claim was made was entered in the claim as "dwelling-house."

It was proved or admitted in each case that such "dwelling-house" consisted of a portion of a building known and hereinafter referred to as an "ordinary dwelling-house," which portion had been let under a system very prevalent in West Ham and known as "the half-house system," under which ordinary dwelling-houses were let in portions, usually in halves, to different persons, one person separately occupying one portion and another person separately occupying another portion, some other and lower parts of the house (e.g., the front door and passages) being common to the use of both occupiers, the landlord of each of the two portions of the building being the same person. In each case the landlord of the ordinary dwelling-house did not reside therein; he had not any person residing therein as his representative, nor had he reserved any portion thereof for his own use. In each case the occupation of the "dwelling-house" in respect of which the claim was made was a separate occupation. In each case the claimant was not separately rated in respect of such separate occupation. In the case of the appellant, Crow, the two portions of the ordinary dwelling-house were rated as a whole, the name of the occupier being entered in the rate-book as David Pilbro (1), the gross estimated rental being entered as 19*l.*, and the rateable value as 15*l.* The landlord paid the rates during the qualifying period by arrangement with the tenants, but no point of law was raised before the revising barrister upon this.

It was contended on behalf of the several claimants (and this

(1) David Pilbro was stated to be the occupier of that portion of the house not in the occupation of the appellant.

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was the only point raised before the revising barrister) that, inasmuch as the two portions, or halves, of the ordinary dwelling-house together comprised the whole of that house, that house must be regarded as being "wholly let out in apartments or lodgings" within the meaning of that expression in s. 7 of the Representation of the People Act, 1867 (1), and that the claimants were therefore entitled to have their names inserted in the lists by virtue of s. 19 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), and s. 14 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), and that separate rating in respect of the separate occupations of the several claimants was not necessary.

The revising barrister, having regard to the fact that in no case did the landlord of the ordinary dwelling-house either reside therein, or have a person residing therein as his representative, or reserve any portion thereof for his own use, and also having regard to the definition or explanation of the term "lodger" as given in decided cases, for instance, *Bradley* v. *Baylis* (2) and *Ancketill* v. *Baylis* (3), and to the definition of the term "lodgings" as given in s. 5 of the Parliamentary and Municipal Registration Act, 1878, held that the claimants were (as indeed they claimed to be) inhabitant occupiers of dwelling-houses within the definition of "dwelling-house" as given in s. 5 of the Act of 1878, and that the ordinary dwelling-houses, in which the "dwelling-houses" in respect of which the claims were made were contained, could not

(1) 30 & 31 Vict. c. 102, s. 7: "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough instead of the occupier his liability to be rated in any future rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"(1.) After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned;

. . . .

Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

(2) (1881) 8 Q. B. D. 195.

(3) (1882) 10 Q. B. D. 577.

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be regarded in point of law as being "wholly let out in apartments or lodgings" as contended for on the claimants' behalf. He also held that, as the occupation of the several claimants of the several dwelling-houses was a separate occupation, they should each have been separately rated in respect of such occupation (see *Allchurch* v. *Hendon Union* (1) and *Kent* v. *Fittall* (2)), and that not being so rated they were not entitled to have their names inserted in the lists in respect of which they claimed the franchise, and he disallowed their claims accordingly.

Notice of appeal was given in each case. The appeals were consolidated, Walter George Crow being named the appellant, and the town clerk of West Ham the respondent.

The question for the opinion of the Court was whether the revising barrister was right in disallowing the claims on the grounds hereinbefore stated.

If the Court should be of opinion that the decision was wrong, the register was to be amended by inserting therein the names of the appellant and of the 124 other claimants.

J. A. Foote, K.C. (*Hugh Fraser* with him), for the appellant. This house was "wholly let out in apartments or lodgings" within the meaning of s. 7 of the Representation of the People Act, 1867. The revising barrister thought that a house which was let out in two or more portions, each portion being a separate dwelling-house, and in which the landlord did not reside, did not come within the words in s. 7. He thought that "lodgings" necessarily implied that the landlord lived in the house. The section, however, is dealing with a dwelling-house in which the landlord does not reside; the house must be "wholly let out" in apartments or lodgings. The term "lodgings" is defined in s. 5 of the Parliamentary and Municipal Registration Act, 1878, as including "any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." That definition covers the present case. The appellant occupied a place of residence in a dwelling-house. A person may occupy "lodgings" as a householder; he need not be a lodger. This is clear from

(1) [1891] 2 Q. B. 436. (2) [1911] 2 K. B. 1102.

Bradley v. *Baylis*. (1) There is in addition the word "apartments," within which the present case clearly comes: *Bradley* v. *Baylis*. (2) If the revising barrister is right this provision of s. 7 is meaningless, because if the landlord resides in the house, the house is not "wholly let out" in apartments or lodgings, and if the landlord does not reside there it cannot be said to be let out in apartments or lodgings. In *Allchurch* v. *Hendon Union* (3) a very different question arose from that in the present case. The question was whether, where a house was let partly to one tenant and partly to another, each having the exclusive occupation of the part let to him, the tenants could be jointly rated as joint occupiers of the house, and the Court held that they could not. The Court, no doubt, went on to say that each should have been separately rated in respect of his exclusive occupation, but that was only a dictum, and no question arose under that part of s. 7 of the Act of 1867 as to rating the owner in the case of a dwelling-house wholly let out in apartments or lodgings. That part of the section was not referred to in the case. Nor does the case of *Kent* v. *Fittall* (4) apply, because there the landlord resided in the house, and no question arose under that part of s. 7. The present case comes within s. 7, and the owner ought to have been rated in respect of the whole house, and therefore the claimants are deemed to be rated and are entitled to the franchise under s. 19 of the Poor Rate Assessment and Collection Act, 1869, and s. 14 of the Parliamentary and Municipal Registration Act, 1878. The decision of the revising barrister was therefore wrong.

F. F. Daldy, for the respondent. In view of the decision of this Court in *Griggs* v. *Stevens* (5) it is not contended that this house, being an ordinary dwelling-house, was not "wholly let out in apartments" within the meaning of s. 7 of the Representation of the People Act, 1867. If, however, the house had been structurally divided into separate dwelling-houses it is not admitted then that s. 7 would have applied. That being so, if there were nothing more, the claimants would be entitled to have their names placed on Division I. of the list of voters. There is,

(1) 8 Q. B. D. 195, at pp. 234, 235.
(2) Ibid. at pp. 219, 220.
(3) [1891] 2 Q. B. 436.
(4) [1911] 2 K. B. 1102.
(5) (1909) 101 L. T. 950.

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however, an objection to the Court entertaining this case at all. The point of law upon which the case is stated is whether these dwelling-houses in the borough of West Ham are "wholly let out in apartments or lodgings not separately rated" within the meaning of s. 7 of the Act of 1867. In *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society* (1) it was held that s. 7 of that Act only applied to owners rated in respect of premises situated in a parliamentary borough existing at the date of the passing of the Act, and that therefore the section had no application to premises in West Ham, which only became a parliamentary borough in 1885 under the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23). That decision was referred to with approval by the Court of Appeal in *White & Hales* v. *Islington Corporation*. (2) Therefore s. 7 of the Act of 1867 can have no application to the borough of West Ham, and it is quite irrelevant to consider that section in this case. Upon the face of the case this section has no application. By s. 42 of the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), an appeal is only given from the decision of a revising barrister "on any point of law material to the result of such case." The point of law stated by the revising barrister upon s. 7 of the Act of 1867 is not material to the result because that section has no application to West Ham. The revising barrister has placed a construction upon an immaterial section in an Act of Parliament and asks the Court to say whether that construction is correct. The Court ought to refuse to answer the question put by the revising barrister. No doubt this point was not taken before the revising barrister, but that does not affect the duty of the Court, especially seeing that, if the decision of the revising barrister upon s. 7 of the Act of 1867 is reversed, the names of a number of persons who are not entitled will be placed on the register.

[PHILLIMORE J. Are not we confined to the point of law which was raised before the revising barrister and upon which our opinion is asked?]

The cases are specified in Rogers on Registration, 17th ed., p. 354. In *Simpson* v. *Wilkinson* (3) it was said that the appellant,

(1) [1892] 1 Q. B. 654, at p. 659. (2) [1909] 1 K. B. 133.
(3) (1844) 7 Man. & G. 50.

who was objecting to the name of a person being retained on the list of voters, could not raise an objection not taken before the revising barrister. A respondent may, however, support the decision of the revising barrister upon any ground of law. The claimants claimed to have their names inserted in Division I. of the occupiers' list, and it lay upon them to prove their claims. They have not done so. No formal notice of objection was necessary. The revising barrister has submitted an immaterial question to the Court, and the Court ought to decline to answer it.

J. A. Foote, K.C., in reply. This point was not raised before the revising barrister, and it may well have been that no one desired to raise it. The point cannot be taken in this Court, and it is not open to the town clerk, who is made respondent on the appeal, to raise it now. Sect. 43 of the Parliamentary Voters Registration Act, 1843, and s. 38 of the Parliamentary and Municipal Registration Act, 1878, shew that a town clerk is made respondent in an appeal in order to support the decision of the revising barrister upon the point of law stated in the case. If the point had been raised before the revising barrister it might have been shewn that nearly all of these houses would come within ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, and the claimants might have obtained their votes accordingly.

LORD ALVERSTONE C.J. Whether the point raised on behalf of the respondent as to the position of the borough of West Ham in relation to s. 7 of the Representation of the People Act, 1867, is or is not a good one, he cannot be allowed to raise it in this Court. If the point had been taken before the revising barrister that s. 7 of the Act of 1867 did not apply to West Ham, the claimants might perhaps by some other means have shewn that they were entitled to have their names inserted in the lists of voters. It is true that the name of West Ham appears in the case, and it may be that the case of *Churchwardens, &c., of West Ham* v. *Fourth City Mutual Building Society* (1) has decided that s. 7 does not apply to West Ham, which was not a parliamentary

(1) [1892] 1 Q. B. 654.

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borough at the date of the passing of the Act. Still I think that we should be acting contrary to a series of authorities if we allowed the point to be taken now. It seems to me that the cases of *Simpson* v. *Wilkinson* (1), *Nunn* v. *Denton* (2), and *Druitt* v. *Gossling* (3) are instances of the rule that this Court will not allow a point to be raised which was not taken before the revising barrister, and the fact that the name of West Ham appears on the face of the case is not sufficient to entitle the respondent to take the point now that s. 7 of the Act of 1867 does not apply to West Ham, and that the claimants cannot rely upon it in support of their claims to have their names inserted in the lists of voters.

There remains the point which is raised in the case. The revising barrister held that this house, which he described as an ordinary dwelling-house, could not be regarded in law as being "wholly let out in apartments or lodgings" within the meaning of s. 7 of the Act of 1867. The house is stated to have been let out on the half-house system. I do not suppose that that means that there was some peculiar construction of the house. As I understand, it was an ordinary dwelling-house let out in two portions to different persons, each of whom separately occupied the portion let to him. Therefore this was a dwelling-house with two sets of apartments, the landlord not living in the house. Sect. 7 contains the words "apartments" and "lodgings." If the two occupants had been occupying under circumstances which made them lodgers, the section would clearly apply. For some reason the revising barrister has not given effect to the word "apartments." In this house there were two sets of apartments which embraced the whole house. It seems to me that the reasoning in *Bradley* v. *Baylis* (4) is against the view taken by the revising barrister, and that the house was "wholly let out in apartments" within the meaning of s. 7.

With regard to the decision in *Allchurch* v. *Hendon Union* (5), under which the revising barrister thought that each of the tenants should have been separately rated in respect of his

(1) 7 Man. & G. 50.
(2) (1844) 7 Man. & G. 66.
(3) (1888) Fox & Sm. Reg. Cas. 123, at p. 127.
(4) 8 Q. B. D. 195.
(5) [1891] 2 Q. B. 436.

occupation, that case obviously can have no application to this case to which the exception in s. 7 applies. Under that clause the owner is the person who ought to be rated, and the claimants are entitled to the franchise. The appeal must be allowed.

PHILLIMORE J. I am of the same opinion. The revising barrister has found that each of the claimants separately occupied a portion, usually a half, of a dwelling-house, that is to say, not a house structurally divided into two portions, but a portion of an ordinary dwelling-house. In that state of matters it is contended, upon the assumption that s. 7 of the Representation of the People Act, 1867, applies to this borough, that this is a "dwelling-house or tenement wholly let out in apartments or lodgings" within the meaning of that section, and that therefore the claimants are entitled to the franchise. It is said by the revising barrister that this case does not come within that clause of s. 7, because the word "lodgings" implies a lodger; in other words, that the expression "lodgings" implies a place in which ex necessitate a lodger lives, and these claimants are not lodgers. The revising barrister seems to me to have taken too narrow a view of the word "lodgings," and he has entirely overlooked the word "apartments." I feel no doubt that this house was wholly let out in apartments—it is not necessary to decide whether it is not also right to say that it was wholly let out in lodgings—and therefore upon the assumption that the section applies the claimants are entitled to the franchise.

My difficulty is this. There is a decision binding upon us that s. 7 only applies to parliamentary boroughs which were in existence at the date of the passing of the Act of 1867, and if that is so the construction of s. 7 is wholly immaterial to this case, as West Ham did not become a parliamentary borough until 1885. I felt some difficulty in being a party to a decision which might place upon the register of voters the names of persons who were not qualified. I think, however, that we are bound by the question stated for our opinion by the revising barrister, namely, whether he was right in disallowing the claims on the grounds thereinbefore stated, and that we are confined to that question. That seems to me to be in accordance

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with the practice. The cases of *Simpson* v. *Wilkinson* (1) and *Druitt* v. *Gossling* (2) are illustrations of the practice of the Court, and there is good reason why we should be confined, not merely to the points of law arising on the facts stated in the case, but to the points of law reserved by the revising barrister for the opinion of the Court, because it may well be that, if the revising barrister had taken another view of the law and not applied s. 7, some other fact might have been proved or the claims might have been shaped in some other way by the claimants so as to entitle them to the franchise. We are therefore confined to the point of law stated for our opinion by the revising barrister, and I agree that the appeal should be allowed.

PICKFORD J. I agree.

Appeal allowed.

Solicitors for appellant: *Russell-Cooke & Co.*

Solicitors for respondent: *Hillearys.*

(1) 7 Man. & G. 50. (2) Fox & Sm. Reg. Cas. 123, at p. 127.

W. F. B.

[COURT OF CRIMINAL APPEAL.]

1913
Jan. 27.

THE KING *v.* RICHARDSON AND ANOTHER.

Quarter Sessions—Justices sitting in two Courts—Disagreement of Jury at Trial in one Court—Jurisdiction of Justices in the other Court to discharge Jury.

Where at quarter sessions two Courts are constituted for the trial of prisoners, and at a trial in one Court the jury disagree, the jurisdiction to discharge the jury is not vested in the chairman of the Court of trial alone, but may lawfully be exercised by other justices.

Query if it is a necessary condition of a valid discharge of the jury at a criminal trial that the prisoner should be present when the discharge is ordered.

APPEAL to the Court of Criminal Appeal.

The two appellants were indicted for burglary at the North Riding Quarter Sessions. The justices were sitting in two Courts for the trial of prisoners, and the charge against the appellants was heard in the second Court. The jury were unable to agree, and the chairman of the second Court adjourned his Court for a short time to give the jury an opportunity of coming to an agreement. Before the hour to which the Court had been so adjourned arrived, the chairman of the first Court, which had finished all the cases before it, hearing that the jury in the appellants' case were still in disagreement, sent for them, and, upon their stating that there was no chance of their agreeing, discharged them. It did not appear whether at the time of the discharge the appellants were not present. The appellants were thereupon given into the charge of a fresh jury in the first Court. Before the case was opened the appellants' counsel took the objection that the Court had no jurisdiction to retry them, on the ground that the discharge of the former jury by a justice other than the presiding justice in the Court of trial was invalid, and that the appellants were consequently still in the charge of the first jury. The chairman overruled the objection and the trial proceeded. The appellants were convicted.

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Nixon, for the appellants. The chairman of the first Court had no power to discharge the jury. That was a matter for the discretion of the chairman of the second Court before whom the appellants were tried. In *Reg.* v. *Charlesworth* (1) and *Winsor* v. *The Queen* (2) all the judges treat the discharge of a jury as a matter for the discretion of the judge, that is the judge at the trial. The exercise of such discretion could not be reviewed by a Court of error. In the latter case Erle C.J., delivering the judgment of the Exchequer Chamber, said: "We hold that the judge at the first trial had by law power to discharge the jury before verdict, when a high degree of need for such discharge was made evident to his mind from the facts which he had ascertained. We cannot define the degree of need without some standard for comparison; we cannot approach nearer to precision than by describing the degree as a high degree such as in the wider sense of the word might be denoted by necessity. We hold further that the judge alone had to decide when the 'necessity,' in this sense of the word, for the discharge of the jury was made evident to him, and his decision thereon is not made subject to review by any legal tribunal." And in *Reg.* v. *Davison* (3) Hill J. said: "I take the rule to be that the presiding judge at the trial is the sole arbitrator of all matters before him, and that his discretion is not in any way to be made the subject of review . . . . It is the presiding judge, and he alone, who is to decide (without the interference of a jury or any other authority) whether a case of necessity has arisen or not." The same reason which prevents the presiding judge's discretion from being reviewed equally applies to prevent another judge from exercising the discretion in his stead, namely, that the judge who presided at the trial is the only one who has the necessary materials for the exercise of that discretion. The present reluctance of a jury to agree may be quite consistent with the absence of that "high degree of need" which alone can justify their discharge, and may be outweighed by facts proved at the trial which would not be within the knowledge of a judge who was not present at it. The effect of 21 & 22 Vict. c. 73, s. 9, by which power was first given

(1) (1861) 31 L. J. (M.C.) 25. (2) (1866) L. R. 1 Q. B. 390.
(3) (1860) 2 F. & F. 250.

to justices in quarter sessions to sit in two Courts, was to create, where they did so, two separate Courts of co-ordinate jurisdiction, neither of which ought to interfere with the other. Further it did not appear that the appellants were present in Court when the jury were discharged, and that fact alone would be sufficient to invalidate the discharge even if it had been directed by the judge of the Court of trial.

Rowan Hamilton, for the prosecution, was not called upon.

The judgment of the COURT (Ridley, Avory, and Lush JJ.) was delivered by

AVORY J. It has been contended on behalf of the appellants that the chairman of the first Court had no power to discharge the jury before whom the trial had taken place in the second Court, and who had been locked up for some time without coming to an agreement, and that that discharge having been invalid the second trial was a nullity. It is said that in all the cases dealing with the discretion to discharge a jury the judgments speak of the discretion as being that of the presiding judge at the trial. Here the presiding judge was the chairman of the second Court, and it is said that he and he alone could exercise that discretion. We think, however, that in none of the cases cited had the Court before them such a point as is raised here. All that was decided in those cases was that the discretion once exercised was not open to review. That is a very different thing from the question with which we have to deal. Here we must assume in the absence of evidence to the contrary that at the time of the jury's discharge the chairman of the first Court was sitting in a properly constituted Court consisting of two or more justices, and if so the discharge was perfectly valid as a discharge, not by the chairman, but by the Court of quarter sessions. It was further contended that the discharge, even if in other respects good, was invalid by reason of its having been ordered at a time when it is suggested that the appellants were not present. We cannot assume that they were not present, and it is doubtful if their presence was necessary, for the discharge of the jury operated as if there had been no trial at all. For these reasons we

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think that the second trial was valid and that the appeals should be dismissed.

Appeals dismissed.

Solicitor for appellants : *Registrar of Court of Criminal Appeal.*

Solicitor for prosecution : *Director of Public Prosecutions.*

J. F. C.

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Nov. 14, 15 ; *Dec.* 6.

[IN THE COURT OF APPEAL.]

LATHAM *v.* R. JOHNSON & NEPHEW, LIMITED.

Negligence—Landowner — Unfenced Land— Leave and Licence to enter— Children—Invitation—Allurement—Dangerous Object—Injury—Liability.

The defendants were owners of a plot of unfenced waste land from which old houses had been cleared. It did not adjoin any public highway, but was accessible by a path leading from the back of the house in which the plaintiff, a child between two and three years old, lived with her parents. The public were allowed by the defendants to traverse the land, and children of all ages were in the habit of playing upon heaps of sand, stone, and other materials which from time to time were deposited there by the defendants. The plaintiff went upon the land unaccompanied by any older person and was shortly afterwards found upon a heap of paving stones, one of which had fallen upon her hand and injured it. There was no evidence to shew how the accident happened. In an action for negligence the jury found that children played upon the land with the knowledge and permission of the defendants ; that there was no invitation to the plaintiff to use the land unaccompanied ; that the defendants ought to have known that there was a likelihood of children being injured by the stones ; and that the defendants did not take reasonable care to prevent children being injured thereby. Upon these findings Scrutton J. held that the case came within *Cooke* v. *Midland Great Western Railway of Ireland* [1909] A. C. 229, and gave judgment for the plaintiff with damages :—

Held, on appeal, that, there being neither allurement nor trap, nor invitation, nor dangerous object placed upon the land, the defendants were not liable.

Cooke v. *Midland Great Western Railway of Ireland* considered and distinguished.

Decision of Scrutton J. reversed.

APPEAL from a judgment of Scrutton J. in an action for negligence.

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The action was brought by an infant, a child between two and three years old, suing by her next friend, for damages for an injury sustained by her while upon the defendants' land. The land in question formed the site of some old houses which had been pulled down, leaving an open space of waste ground of considerable extent. A wall which had bounded the land upon one side had been pulled down at the same time as the houses. The public were allowed by the defendants to traverse the land, and children of all ages were in the habit of playing upon heaps of sand, stone, and other materials which from time to time were deposited there by the defendants. The land did not adjoin any public highway, but it was accessible by a path which led from the back of the house in which the plaintiff lived with her parents. On the morning of the day upon which the plaintiff was injured the defendants had deposited upon the land a cart-load of large paving stones, which were tipped upon the ground in an irregular heap. The plaintiff, unobserved by her mother, who had just dressed her, and was attending to the other children, left the house, unaccompanied by any older person, and a short time after was found sitting upon one of the stones with her hand beneath another by which it was crushed and injured in such a manner that one of her fingers had to be amputated. It appeared that the mother knew that the stones were on the land and thought that they might be dangerous to children. There was no evidence to shew how the accident had happened. At the trial the jury found, in answer to questions left to them by the judge, (1.) that children played upon the land with the knowledge and permission of the defendants; (2.) that there was no invitation to the plaintiff to go upon the land unaccompanied; (3.) that the defendants ought to have known that there was a likelihood of children being injured by the stones; and (4.) that the defendants did not take reasonable care to prevent children being injured thereby. They assessed the damages at 15*l.*

In giving judgment for the plaintiff for that amount Scrutton J. said that the jury had found facts which brought the case directly within the principle stated by Lord Macnaghten in *Cooke* v. *Midland Great Western Railway of Ireland.* (1) It was true

(1) [1909] A. C. 229.

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that that decision had been distinguished in *Jenkins* v. *Great Western Railway* (1), but in that case the child was not upon the spot to which the leave and licence extended, but on the rails, and there was no finding that the spot to which the leave and licence extended was dangerous. Here the child was on the spot to which the leave and licence extended, and there was a finding of the jury that that spot was dangerous. He had some doubt as to whether there was evidence on which the jury could find want of reasonable care, but they might have thought that the defendants ought not to let children on the land at all if it was dangerous; that they ought to fence it. They might have thought that the defendants ought to have provided somebody to keep the children off the stones. He could not say there was no evidence on which they could come to that conclusion.

The defendants appealed.

Sutton, for the appellants. Scrutton J. thought that he was bound by the decision in *Cooke* v. *Midland Great Western Railway of Ireland* (2), but it does not cover this case. There it was held that the turntable upon which the plaintiff was injured constituted a trap. It might have been rendered safe, and was not, and there was an invitation to the plaintiff to go upon the land to play with a dangerous machine. This case is more like *Jenkins* v. *Great Western Railway* (1), where *Cooke* v. *Midland Great Western Railway of Ireland* (2) was distinguished. In *Burchell* v. *Hickisson* (3) Lindley J. said "There was no invitation to the plaintiff" (a boy of four years) "if he was not guarded, and if guarded, then there was no trap."

This case may be put in the same way. The mother of the plaintiff knew that the stones were there and might be unsafe for the child to play upon. There was no trap in this case.

In *Stevenson* v. *Corporation of Glasgow* (4) Lord Kinnear said that it was obvious enough that no structural precautions would be sufficient to protect a child of two or three years old if it were left by itself in a public place. The only real security was that children who were too young to take care of themselves should

(1) [1912] 1 K. B. 525.
(2) [1909] A. C. 229.
(3) (1880) 50 L. J. (C.P.) 101.
(4) 1908 S. C. 1034.

be taken care of by somebody else. The duty to take care of them was not laid by law upon the defendants in that case.

If a child of tender years and unable to take care of itself goes uninvited and unaccompanied upon land where it may sustain an injury there is no obligation upon the owner to take more care than in the case of an adult. There was here no invitation to a child of tender years unaccompanied, and if the child was accompanied there was no trap. See also *Barker* v. *Herbert* (1), where *Cooke* v. *Midland Great Western Railway of Ireland* (2) was also distinguished.

Again, the learned judge was wrong in saying that the finding of the jury was justified if they thought that the defendants ought not to have let the children upon the land at all. There was no evidence and no finding by the jury as to what the defendants ought to have done. *Williams* v. *Great Western Railway* (3) shews what ought to be proved in such a case. The plaintiff in order to succeed must shew that there is a reasonable probability that the accident arose from want of some precaution which the defendants might and ought to have taken, and must also shew with reasonable certainty what particular precautions should have been taken.

Cyril Atkinson, for the respondent. This case is covered by *Cooke* v. *Midland Great Western Railway of Ireland*. (2) It is sufficient on behalf of the respondent to establish leave and licence—that the respondent was upon the land with the knowledge and permission of the appellants: *Lowery* v. *Walker*. (4)

[FARWELL L.J. Do you suggest that it was incumbent upon the appellants either to fence off their land or to provide a caretaker for children of tender years?]

Lord Macnaghten in *Cooke* v. *Midland Great Western Railway of Ireland* (2) seems to have thought that it was the duty of the company to take ordinary precautions to prevent such an accident as there occurred.

[FARWELL L.J. That was quite a different case. There there was a machine which was to all intents and purposes an inviting merry-go-round.]

(1) [1911] 2 K. B. 633.
(2) [1909] A. C. 229.
(3) (1874) L. R. 9 Ex. 157.
(4) [1911] A. C. 10.

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The owners in such a case owe a duty to children, who go upon their land with leave and licence, not to put anything dangerous upon the land.

[COZENS-HARDY M.R. When children are allowed to play in a meadow through which a stream runs is the owner responsible for the death of a child by drowning?]

Here the appellants have not left the ground in its natural condition. If an owner knowingly permits children to come and play on his land he must not do anything which he ought to foresee may be dangerous to them.

In *Cooke* v. *Midland Great Western Railway of Ireland* (1) Lord Macnaghten said 'that the question for the consideration of the jury might be stated thus: "Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?"

[COZENS-HARDY M.R. There is nothing like that here.

FARWELL L.J. There was an alluring invitation there.]

There need not necessarily be any allurement; the placing of something on the land which is likely to cause danger is enough to make the owner responsible: *Lowery* v. *Walker*. (2)

The appellants ought to have foreseen that the stones might form a source of danger to children: *Jackson* v. *London County Council*. (3)

Sutton, in reply. The argument for the respondent is now based on leave and licence. *Cooke* v. *Midland Great Western Railway of Ireland* (4) was put upon the ground of invitation to play upon a dangerous machine and does not cover this case.

There was no invitation here to play with the stones, and no

(1) [1909] A. C. at p. 234.
(2) [1911] A. C. 10.
(3) (1912) 28 Times L. R. 66, 359.
(4) [1909] A. C. 229.

invitation at all to very young children unaccompanied by a responsible person to look after them.

A licensee has no right of action as against the owner except in the case of a "trap" or fraud. The licence merely affords an answer to a charge of trespass: *Bolch* v. *Smith*. (1) See also *Grand Trunk Railway of Canada* v. *Barnett* (2) and *Brock* v. *Copeland*. (3) *Jackson* v. *London County Council* (4) was a very different case. There what was left upon the land was known to be dangerous.

If there was only leave and licence no such duty as is suggested was put upon the appellants. If the case is put upon invitation, then it is submitted that no invitation was extended to very young children unaccompanied.

Cur. adv. vult.

FARWELL L.J. In this case, the injured child is between two and three years old and the place on which she was injured is a piece of waste ground, from which houses condemned by the local authority have been recently cleared. This waste ground adjoins a path leading to the house in which the child lives with her parents, but does not adjoin any public highway although accessible from it by the before-mentioned path. No question therefore arises of the duty not to do anything that may be a nuisance close to or upon a highway, such as arose in *Jewson* v. *Gatti* (5), *Harrold* v. *Watney* (6), or in *Lynch* v. *Nurdin* (7), which, with all respect to Lord Macnaghten's contrary opinion in *Cooke* v. *Midland Great Western Railway of Ireland* (8), was clearly a case of nuisance. The horse and cart left unattended in the highway, to use the language of Vaughan Williams L.J. (9), "constituted a danger to those using the highway — that is, it constituted a nuisance." Nor is the accessibility from the highway in this case of any importance, because the child did not come from the highway but from her own home on to the pathway and so on to the land.

(1) (1862) 7 H. & N. 736.
(2) [1911] A. C. 361.
(3) (1794) 1 Esp. 203.
(4) 28 Times L. R. 66, 359.
(5) (1886) 2 Times L. R. 381.
(6) [1898] 2 Q. B. 320.
(7) (1841) 1 Q. B. 29.
(8) [1909] A. C. at p. 234.
(9) [1898] 2 Q. B. 324.

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The case on the findings of the jury raises the question of the liability of the owner of land who permits the public, adult and infant alike, to pass and repass over it and to run about and play on it to people so using it. The jury by their answer to the second question have precluded all argument founded on invitation, and I am not sure that their answer does not impliedly negative leave and licence as well: for if the true inference is (as Lindley J. puts it in *Burchell* v. *Hickisson* (1)) that the plaintiff never invited a child of so tender an age as to be unable to appreciate any danger to come except under the care of some responsible person, the same reasoning would apply to mere leave and licence. For myself I am prepared to hold that there was no evidence to go to the jury which would shew any legal liability. But as the case has been argued on the assumption that leave and licence was given to all alike, I will deal with it on that footing also.

Now the law as to mere licensees is well settled. The grant of the licence to go on the land creates no right, but merely affords an answer to a charge of trespass: *Bolch* v. *Smith*. (2) It is a mere permission, and those who take it must take it with all chances of meeting with accidents: *Binks* v. *South Yorkshire Ry. Co.* (3), where Wightman J. adopted the judgment of Williams J. in *Hounsell* v. *Smyth* (4), where he says: "No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint,—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils." "Any complaint by the licensee may be said to wear the colour of ingratitude so long as there is no design to injure him": per Willes J., *Indermaur* v. *Dames*. (5) The same learned judge, one of the greatest common law lawyers of the last century, says in *Gautret* v. *Egerton* (6):

(1) 50 L. J. (C.P.) 101.
(2) 7 H. & N. 736, 745.
(3) (1862) 3 B. & S. 244, 252.
(4) (1860) 7 C. B. (N.S.) 731.
(5) (1866) L. R. 1 C. P. 274, at p. 285.
(6) (1867) L. R. 2 C. P. 371.

"The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable . . . . To create a cause of action, something like fraud must be shewn. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence." The owner of cliffs by the sea who allows the public to walk there is not bound to fence them off, nor is the owner of downs who allows people to walk and ride thereon liable for unfenced quarries or banks honeycombed by rabbits, however dangerous they may be. There are, however, the following exceptions to the freedom from liability, namely, (1.) "Allurement" in the evil sense of alluring with malicious intent to injure. This gives a right of action even to a trespasser—*Townsend* v. *Wathen* (1); *Deane* v. *Clayton* (2); *Ponting* v. *Noakes* (3)—and a fortiori therefore to a licensee. (2.) "Concealed trap"—that is, something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous and without giving notice to the licensee. "A person coming on lands by licence has a right to suppose that the person who gives the licence . . . . will not do anything which will cause him an injury": per Willes J., *Corby* v. *Hill*. (4) So, too, if something known to the owner to be in a dangerous state is put on the premises for the purpose of being used by the licensee, e.g., rotten planks for a bridge over a stream, this is actionable, notwithstanding that the grantor of a right of way is not bound to repair it if foundrous: see Gale on Easements, 8th ed., p. 475, and cases there cited. (3.) "Invitation" is

(1) (1808) 9 East, 277.
(2) (1817) 7 Taunt. 489, at p. 523.
(3) [1894] 2 Q. B. 281, at p. 290.
(4) (1858) 27 L. J. (C.P.) 318, 321; 4 C. B. (N.S.) 556, 567.

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excluded by the finding of the jury in this case, but the authorities throw some light on the question before us. See the judgment of Bramwell B. in *Southcote* v. *Stanley* (1): "I agree with Mr. Gray to this extent, that where a person is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trapdoor to be open, through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring-guns or man-traps, and the latter, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission"; and Erle J.'s remark on that case in *Chapman* v. *Rothwell* (2): "The distinction is between the case of a visitor (as the plaintiff was in *Southcote* v. *Stanley* (3)) who must take care of himself, and a customer who, as one of the public, is invited for the purposes of business carried on by the defendant"; and in *Indermaur* v. *Dames* (4) Willes J. draws the same distinction between the person on the premises "on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest," and the person there on bare permission. In my opinion, "invitation" within the meaning of that phrase in the decided cases does not extend to persons coming merely for their own pleasure as members of a general body of licensees. (4.) The last exception is the introduction into the land to which the licence applies of something out of the normal user of the land, known to the owners to be dangerous, without warning the licensee. There is a dictum of Lord Kenyon illustrating this in *Brock* v. *Copeland* (5), which is thus stated and explained by Gibbs C.J. in *Deane* v. *Clayton* (6): "The defendant in that case

(1) (1856) 1 H. & N. 247, 250.
(2) (1858) E. B. & E. 168, 170.
(3) 1 H. & N. 247.
(4) L. R. 1 C. P. 274, at p. 285.
(5) 1 Esp. 203.
(6) 7 Taunt. at p. 532.

kept a mischievous bull in a close of his own, and the plaintiff, crossing this close, was gored by the bull. It was further proved that the defendant had acquiesced in the use of a way over his close, and that the plaintiff was passing along such permitted way. Upon this ground Lord Kenyon, and afterwards the Court of King's Bench, held that the action was maintainable; because the defendant had held out to the plaintiff and the rest of the public, that they had a right of passage through this close, and having encouraged them to exercise the right, he must not annoy them in the act of using it." "Right" in this sentence obviously does not mean a legal right, but permission. *Lowery* v. *Walker* (1) is another instance of this exception.

I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian. See *Burchell* v. *Hickisson* (2), *Schofield* v. *Mayor, &c. of Bolton* (3), and *Stevenson* v. *Corporation of Glasgow*. (4) A child may be too young to be guilty of contributory negligence and yet old enough to tease a peaceful donkey or cow into kicking; but it cannot be said that the owner who allows adults and children alike to walk through his meadow where he turns out the ordinary quiet dairy cows is liable for injury done to a child who torments them. There must be something more than the mere normal user by ordinary animals or for ordinary purposes. There must be something abnormally dangerous in the animal introduced to create any liability for introducing it.

If the law be as I have stated and believe it to be, there is nothing in this case to raise any liability in the defendants. There is neither allurement nor trap, invitation, or dangerous animal or thing. The use of the land for depositing stones is a normal user, and stones are no more dangerous than cows or donkeys, if indeed as much. It is impossible to hold the defendants liable unless we are prepared to say that they are bound

(1) [1911] A. C. 10.
(2) 50 L. J. (C.P.) 101.
(3) (1910) 26 Times L. R. 230.
(4) 1908 S. C. 1034.

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to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country. We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment: sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles.

The plaintiff's counsel, however, relied (as all counsel in similar cases since 1909 have relied) on *Cooke* v. *Midland Great Western Railway of Ireland* (1) as establishing some new law. I have read and re-read that case many times and I am convinced that none of their Lordships intended to overrule any settled law or to establish any new principle theretofore unknown to the common law. In my opinion, that case is a little obscured by the use of the track or pathway to the turntable: the boys used the track as licensees, but did not suffer any injury in the use of that licence. The real mischief was that there was at the end of the track, being indeed the terminus ad quem of the track, a machine "attractive to children and dangerous as a plaything," to use Lord Macnaghten's words at p. 236, and there is cast on persons who put in a place, open to their licensees, a thing dangerous in itself, a duty to take precautions for the protection of others who will certainly come into its proximity: see *Heaven* v. *Pender*. (2) This is the ground taken by Lord Loreburn L.C. at p. 242 and by Lord Atkinson at p. 240 and by Lord Collins at the bottom of p. 241, and although there may be observations of a wider character in some of the speeches, it is only the decision of the House that is binding, and no dicta of individual members of the House can alter the law or form any ground for extending the real decision beyond the established principles of the common law. *Cooke* v. *Midland Great Western Railway of Ireland* (1) will therefore not help the respondent here, for the proposition enunciated in *Heaven* v. *Pender* (2) applies only to a thing dangerous in itself, such as a loaded gun, and does not extend to a wagon or

(1) [1909] A. C. 229.

(2) (1883) 11 Q. B. D. 503, at p. 517, per Cotton and Bowen L.JJ.

the like, as pointed out by Stirling L.J. in *Earl* v. *Lubbock* (1), and still less to a heap of stones.

I am therefore of opinion that this appeal must be allowed with costs here and below.

HAMILTON L.J. I am of the same opinion.

All that is known of the cause of this accident, which no one witnessed, is this. The plaintiff, aged two years and two months, strayed alone a short distance into the defendants' unfenced croft and was found there shortly after sitting on a large stone with another on her hand, three fingers of which were badly crushed. Adults and children habitually entered this croft, some using it as a short cut, some simply playing there. This the defendants knew. Paving stones were shot there, and there was a large heap of them. A load had been shot shortly before the accident, at least with the defendants' leave and as I gather, though it is not clear, with their authority. The stones were large; the jury saw one for themselves. There is no evidence whether or no any other person was there when the child was hurt. There is no evidence that any one was seen about when the child was found injured, and no statement that no one was about. The stone may have been dislodged by the child herself or by a third person, infant or adult. Opinions may differ as to the probabilities, but it is a mere matter of speculation and we do not know in fact whether the child was "entrapped" or "allured" at all. We do not know what the child was doing. It is suggested that she was playing, but in a child of her age that only means that she is not known to have been doing anything else. In order to succeed the plaintiff must establish against the defendants a breach of duty which would cover either hypothesis. A duty on the defendants' part to use care sufficient to prevent the child from hurting herself, but not extending to the prevention of hurt caused by a third person, would not support the plaintiff's verdict, for in such a case the injury would be equally consistent with the performance as with the neglect of the alleged duty: *Wakelin* v. *London and South Western Railway.* (2)

The argument for the plaintiff, ably put, postulates that *Cooke*

(1) [1905] 1 K. B. 253, at p. 258. (2) (1886) 12 App. Cas. 41.

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v. *Midland Great Western Railway of Ireland* (1) establishes such a comprehensive duty, and that an infant, even though a trespasser, is entitled to have the place it wanders into and the things it finds there made so safe with reference to its own incapacity to take care of itself as to safeguard it from injury. If so, the decision in *Cooke's Case* (1) has radically altered the law. Before considering *Cooke's Case* (1) it is accordingly necessary to look back to the older law.

The duty which one person owes to another to take reasonable care not to cause him hurt by act or omission is relative both to the person injured and the person charged with neglect and the circumstances attending the injury. Among other such circumstances is that of place. Where a question arises, not between parties who are both present in the exercise of equal rights inter se, but between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognized three categories of obligation. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly, though never very definitely measured. The cases down to 1864 are collected in *Sullivan* v. *Waters*. (2) Contractual obligations of course stand apart. The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee. The latter term is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or of material interest. Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the worldly advantage which the host may remotely have in view. Apart from express "licence" or express "invitation," conduct may prove either by implication. An open shop "invites" and perhaps "allures" (Channell B., *Bolch* v. *Smith* (3)) the possible customer: an open goods yard invites the visiting carter. In a frequented neighbourhood and where the owner or occupier may be supposed to know that others regularly enter it and he does not object, an open field may be enough to prove that

(1) [1909] A. C. 229.
(2) (1864) 14 I. C. L. R. 460.
(3) (1862) 31 L. J. (Ex.) 201, at p. 203.

persons, who would otherwise have been trespassers, in fact enter it by his tacit permission and are licensees. The rule as to trespassers is most recently indicated in *Lowery* v. *Walker*(1) and is stated and discussed in *Grand Trunk Ry. Co. of Canada* v. *Barnett.*(2) The owner of the property is under a duty not to injure the trespasser wilfully; "not to do a wilful act in reckless disregard of ordinary humanity towards him"; but otherwise a man "trespasses at his own risk." On this point Scotch law is the same. In English and Scotch law alike, when people come on the lands of others for their own purposes without right or invitation, they must take the lands as they find them, and cannot throw any responsibility upon the person on whose lands they have trespassed: per Lord Kinnear, *Devlin* v. *Jeffray's Trustees.*(3) The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril: *Gautret* v. *Egerton*(4); *Lewis* v. *Ronald*(5); and see generally *Indermaur* v. *Dames*(6); *Collis* v. *Selden*(7); *Holmes* v. *North Eastern Railway*(8); *Batchelor* v. *Fortescue.*(9) Where "the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint . . . . One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils": per Williams J. in *Hounsell* v. *Smyth*(10); and see *Wilkinson* v. *Fairrie*(11), *Binks* v. *South Yorkshire Railway*(12), and *Hardcastle* v. *South Yorkshire Railway.*(13) "The licensee or visitor must take care of himself, in using the premises as he finds them; . . . . he is not entitled to be protected from the existing risks of the premises

(1) [1911] A. C. 10, per Lord Halsbury at p. 13.
(2) [1911] A. C. 361.
(3) (1902) 5 F. 130, at p. 134.
(4) L. R. 2 C. P. 371.
(5) (1909) 101 L. T. 534.
(6) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(7) (1868) L. R. 3 C. P. 495.
(8) (1869) L. R. 4 Ex. 254.
(9) (1883) 11 Q. B. D. 474.
(10) 7 C. B. (N.S.) 731, 743.
(11) (1862) 1 H. & C. 633.
(12) (1862) 32 L. J. (Q.B.) 26.
(13) (1859) 28 L. J. (Ex.) 139.

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in their ordinary state, by the care of the owner": per Pigot C.B. in *Sullivan* v. *Waters*. (1) Again Scotch law is the same. "When a person uses by permission private property where a pond or other dangerous excavation exists, he must take the benefit of the use subject to the risk which attends it": per Lord Shand, *Prentice* v. *Assets Co., Ld.* (2); and *Ross* v. *Keith*. (3) The rule as to invitees is stated in the Exchequer Chamber by Tindal C.J. in *Parnaby* v. *Lancaster Canal Co.* (4): "The common law in such a case" (namely, where a canal company invites customers and persons who come on business to use its canals) "imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property . . . . they are responsible . . . . upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trapdoor open without any protection, by which his customers suffer injury"; and in *Indermaur* v. *Dames* (5) the Exchequer Chamber again approved the rule as stated in the Court below by Willes J.: "With respect to such a visitor at least,"—i.e., a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant have an interest—"we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact." It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway. Such cases, so far as they relate to children, may in that particular be to some extent

(1) 14 I. C. L. R. 460, at p. 469.
(2) (1890) 17 R. 484, at p. 489.
(3) (1888) 16 R. 86.
(4) (1839) 11 Ad. & E. 223, at p. 243.
(5) L. R. 2 C. P. 311, 313.

in point, but the differences between cases of nuisance and cases of negligence must never be lost sight of. The cases of *Lynch* v. *Nurdin* (1), *Jewson* v. *Gatti* (2), *Harrold* v. *Watney* (3), and *Barker* v. *Herbert* (4) are all of this class (see especially per Vaughan Williams L.J. in the last cited case at pp. 637 and 638). In the present case it is not suggested that the stones were near enough to a highway to constitute a nuisance, nor is the claim based on nuisance, but on negligence.

Children's cases are always troublesome. English law has been very ready to find remedies for their injuries. Scotch law has been less indulgent: see *Campbell* v. *Ord & Maddison* (5); *Gavin* v. *Arrol & Co.* (6); *Cass* v. *Edinburgh and District Tramways Co.* (7) They are the commonest cases of the general rule, which is as old as *Scott* v. *Shepherd* (8), that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook* (9); *Lynch* v. *Nurdin* (1)) that injury would not have occurred. Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief. Such cases are collected and elaborately discussed in *Sullivan* v. *Creed.* (10) The following are instances:—*Dixon* v. *Bell* (11); *Illidge* v. *Goodwin* (12); *Lynch* v. *Nurdin* (1); *Clark* v. *Chambers* (13); *Englehart* v. *Farrant & Co.* (14);

(1) 1 Q. B. 29.
(2) 2 Times L. R. 441.
(3) [1898] 2 Q. B. 320.
(4) [1911] 2 K. B. 633.
(5) (1873) 1 R. 149.
(6) (1889) 16 R. 509.
(7) 1909 S. C. 1068.
(8) (1773) 3 Wils. 403.
(9) (1828) 4 Bing. 628.
(10) [1904] 2 I. R. 317, 335.
(11) (1816) 5 M. & S. 198.
(12) (1831) 5 C. & P. 190.
(13) (1878) 3 Q. B. D. 327.
(14) [1897] 1 Q. B. 240.

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McDowall v. *Great Western Railway* (1); *Williams* v. *Eady*. (2)

Each decision seems clear enough, but to fit them all into their places in the theory of negligence is not so easy. We may put aside the questions When is a child capable of and guilty of contributory negligence?—When does the contributory negligence of the injured child's attendant disentitle it to recover? It is also not directly germane to the present case to investigate the duty which a person owning a public place owes to a child who is there as of right, or the obligation of a person who leaves about, in a place known to be frequented by children, objects in themselves capable of causing injury, if meddled with, and which children are likely to meddle with. Loaded guns and heaps of lime left in playgrounds are almost a class by themselves. It is plain that the responsibility of the owner of a close into which an infant strays in circumstances not consistent with a bare trespass might be very formidable if the law stopped here. The child must take the place as he finds it and take care of himself; but how can he take care of himself? If his injury is not to go without legal remedy altogether by reason of his failure to use a diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of the dilemma was found in *Burchell* v. *Hickisson* (3) by deciding that the circumstances may evidence the attachment of a condition to the licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself. Lindley J. says: "There could be no duty on the part of the defendant towards the plaintiff" (aged four) "further than that the defendant must take care that no concealed danger exists. . . . . The defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others there was no concealed danger. In other words, there was no

(1) [1903] 2 K. B. 331. (2) (1893) 10 Times L. R. 41.
(3) 50 L. J. (C.P.) 101

invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap." Logically this principle is applicable to all cases of infirmity or disability and not to infants only. It was of *Burchell* v. *Hickisson* (1), I take it, that Scrutton J. was thinking when he put to the jury the question No. 2. His observations almost repeat the words used in the case. Furthermore, the summing up and his questions not only covered the attachment of a condition to the leave and licence, but also the point whether in any case the plaintiff was more than a bare licensee. Of invitation, in the strict sense, there was and could be no evidence. When he afterwards came to enter judgment the learned judge, not having his actual words before him, assumed that the jury only meant that there was no invitation to this particular child unaccompanied, though there was to others. Even so, the effect of the answer in an action brought by this child would be the same, but I think he hardly did justice to the intelligence of the jury. It was impossible in face of the clear direction given them that they should have meant no more than this. Their verdict on this point places the plaintiff in the position of a bare licensee and no more. Whether it places her position so high, or how a person whose presence is licensed only on a condition can be a licensee if that condition is not performed, need not be considered, for it was not argued that the plaintiff was a trespasser in this case.

Two other terms must be alluded to—a "trap" and "attraction" or "allurement." A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. "Allurements," too, is a vague word. It may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse

(1) 50 L. J. (C.P.) 101.

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peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object.

Finally, what objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap.

I believe this summary of familiar cases to be correct, though not every case can be fitted into the scheme, and some contain language which makes it doubtful where they should be placed. I have made it in order to emphasize the contrast between the law as it was and is, apart from *Cooke's Case* (1), and the new law which it is suggested that *Cooke's Case* (1) has authoritatively laid down. If it is right, this plaintiff would have failed before 1909, for, being a bare licensee, she got hurt, whether by the act of a third person or her own we do not know, by the fall of one of a heap of stones, which was not a trap either in itself or relatively to its surroundings including therein the child. Furthermore, the child's permission to be there at all was conditional, and the condition was not performed. The law could not place the owner's duty of care towards the child so high as to safeguard her from injury by the fall of the stone in

(1) [1909] A. C. 229.

whichever way it may have been caused to fall, nor is there any evidence that the defendants knew that there was anything dangerous about any stones in general or these stones recently shot there in particular. Has, then, *Cooke* v. *Midland Great Western Railway of Ireland* (1) silently altered all this? The case has been several times considered both in England, Scotland, and Ireland. The Court of Appeal in Ireland in *Coffee* v. *McEvoy* (2) declined to regard it as a case on the duty of an owner or occupier of property towards a trespasser, and decided against the injured plaintiff there because he clearly was a trespasser. In *Lowery* v. *Walker* in the Court of Appeal (3)—the reversal of which case in the House of Lords does not affect the present point—Buckley L.J. (4) treats the decision as being one upon which the liability "may arise from the fact that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not," and Kennedy L.J. (5) says of it: "That it is in my opinion a decision of plainly limited application . . . . depending upon the special circumstances . . . . that there was an allurement to children by reason of the condition in which the defendants kept their premises, and the existence thereon of this unprotected machine, and that they knew that such a machine would be likely to allure children." In *Jenkins* v. *Great Western Railway* (6), in this Court, all the members of the Court (the Master of the Rolls at p. 532, Fletcher Moulton L.J. at p. 534, and Farwell L.J. at p. 534) stated that in their opinion *Cooke's Case* (1) was decided on the assumption that Cooke was licensed by the railway company not merely to come upon the land, but to play with the turntable, and it is the case that the jury had found in terms that the child was allured "through the hedge and up to the turntable." Lord Kinnear says the same in *Holland* v. *Lanarkshire Middle Ward District Committee* (7), that in *Cooke's Case* (1) the railway company had "tempted children to play." If so, the present case is at once distinguishable.

(1) [1909] A. C. 229.
(2) [1912] 2 I. R. 290.
(3) [1910] 1 K. B. 173.
(4) Ibid. at p. 193.
(5) Ibid. at p. 200.
(6) [1912] 1 K. B. 525.
(7) 1909 S. C. 1142.

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The finding of the jury in the present case is confined to leave to come upon and play upon the land. It is difficult to see how there could be any implied leave to play with the actual stones in question, for they had only just been put down, and, equally whether the assumed leave was special or general, there was no evidence that the defendants knew of any danger connected with the stones or of any complaint or accident that might reasonably bring home to them the existence of such danger. But assume, as the appellants' argument before us did assume, that *Cooke's Case* (1) turned upon the duty of an owner who keeps, on the land on to which he has invited another, some chattel capable of being dangerous to such person. Of *Cooke's Case* (1) the following things are clear. (i.) Their Lordships declared no new law and overruled no old cases. The question for decision was whether the special facts of the case could be brought within the existing law so as to be proper to be submitted to a jury. (ii.) The case was an extreme one. Lord Loreburn says it was so extreme that, but for the special combination of danger and attractiveness in the machine with neglect of a usual safeguard on the defendants' part by failing to lock it, he could not have concurred (2), and Lord Macnaghten reserves a doubt whether he could have viewed the fact as the jury did. (3) (iii.) The report in the *Law Reports* is very laconic as to the facts. It refers to the head-note for the circumstances, and the head-note states that the children were "trespassing," which is wrong. At least they were licensees on the premises; their habit of playing with this identical turntable was known to the defendants, and counsel admitted (4) that the turntable in the condition in which it actually was on the occasion of the accident was a dangerous plaything for children. This error in the head-note and the unfortunate omission to state the facts explain, I believe, why this case has been so often relied on for principles that it does not lay down and applied to facts to which it does not apply. A reference to the report in the Courts below, which is necessary if the case is to be understood, shews that there was evidence,

(1) [1909] A. C. 229.
(2) Ibid. at p. 242.
(3) Ibid. at p. 233.
(4) See p. 240.

though not uncontradicted, that the bolt, supposed to fasten the turntable, could be withdrawn by a child and that it could then be revolved with "your finger" (see judgment of Johnson J. (1)). Further, the worn track made by frequent entry and passage led from the gap in the fence up to the turntable itself. (iv.) The whole of the law summarized above had been elaborately examined and analysed in the judgments in the Irish Courts, and particularly the authority and true effect of *Lynch* v. *Nurdin* (2), the obligations due to licensees and invitees, the responsibility resulting from dangerous chattels left in public or accessible places, and the effect, if any, upon the directness or remoteness of causation of children's acts intervening so as to be a causa sine qua non. (v.) There was some difference of opinion among their Lordships on the point whether the children were licensees or invitees. All agreed, and the uncontradicted evidence proved that they were not trespassers in the close. Lord Atkinson (3) took them to be licensees; Lord Collins (4) to be invitees; Lord Macnaghten (5) thought that in a case of negligence such as this it mattered not whether the children found the dangerous but attractive object in a place where they were as of right or only under a licence or invitation from the owner. Lord Atkinson in terms (6) speaks of "a most important addition," that the children had leave and licence to play with the turntable to be inferred from their being habitually suffered to do so.

One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or only licensed. There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it

(1) [1908] 2 I. R. at p. 254.
(2) 1 Q. B. 29.
(3) [1909] A. C. at pp. 239, 240.
(4) Ibid. at p. 241.
(5) Ibid. at p. 236.
(6) Ibid. at p. 239.

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into operation. Hence, in my opinion, in any view of it, the decision in *Cooke's Case* (1) is a decision on traps for children. Each of the four opinions says so. I refer to p. 236: "But it does not seem unreasonable to hold" &c.; p. 240: "These latter" (the defendants) "owed to the child a duty not to permit the machine to be in the movable and dangerous, because movable, condition in which they permitted it in fact to be"; p. 241: "The turntable . . . . was a dangerous thing for young children to play with," and p. 242: "A machine dangerous unless protected." The argument that the question for the jury, as stated by Lord Macnaghten on p. 234, gives the decision a wider scope is fallacious. It ignores the fact that Lord Macnaghten is speaking of "the" turntable in question and of that machine as "attractive to children and dangerous as a plaything," an observation which he directs to the consequences which ought to be foreseen by a reasonable man as resulting from his own acts or omission, if the acts of other persons intervene, and with which he concludes his speech. The question was vital because Cooke had been put on the turntable by other boys, who then revolved it, he being purely passive, and the remoteness of his consequent injury had been relied on. Indeed, it is one which generally arises in children's cases and is characteristic of them.

In this respect I think that Scrutton J. failed to appreciate *Cooke's Case*. (1) He framed the questions put to the jury in order to give effect to this passage in Lord Macnaghten's judgment as if it laid down the whole of the matters to be considered, thus omitting reference to the special character of the object in question. As put by Lord Macnaghten with reference to such an object, I think the question was specially directed to the point that the intervening act of another person, or of the plaintiff himself, may not necessarily break the chain of causation between the defendants' negligence—whatever it may be—and the plaintiff's injury, which was so fully discussed in *Sullivan* v. *Creed* (2) and by Palles C.B. in *Cooke's Case* in the Court below. (3) Scrutton J. has treated it as being exhaustive in itself and as being directed to the condition of a plot of land upon

(1) [1909] A. C. 229. (2) [1904] 2 I. R. 317.
(3) [1908] 2 I. R. 242.

which persons are permitted to enter irrespective of the particular chattels to be found there. I cannot concur in his view. I am fully sensible of the burdens that the extension of the principle of *Cooke's Case* (1) for which the respondents contend would impose on property owners, but I prefer not to rest my judgment on them. People who will be publicly good-natured must pay the price. It only shews the wisdom of doing good by stealth, if you do good at all. Besides, in towns where land lies waiting to be built upon, it saves the cost of fencing to let people have access to it, and there are owners who, in such circumstances, would make a virtue of economy. In my opinion, there was no evidence that this recently deposited heap of stones was a trap. It was no more than was to be looked for naturally on such an open plot as this was, and whether it was placed there or was part of the surface left after demolition of the houses could not matter. There is no authority for saying that with regard to such chattels, even placed as they were and towards a child who came on to the land with tacit permission only, the owner was under a duty to see that she should take no hurt from the stones whether dislodged by herself or by another. In face of the answer to the second question put to the jury, the answer to the third became irrelevant, and as to the fourth, there was no duty in law under the circumstances to take care with regard to the matter in question.

The appeal must be allowed with costs here and below, and judgment must be entered for the defendants.

COZENS-HARDY M.R. I agree.

Appeal allowed.

Solicitors: *Sale & Co., Manchester; Rowley & Co., Manchester.*

(1) [1909] A. C. 229.

G. A. S.

NOTE as to the report of *Cooke's Case* [1909] A. C. 229. It is conceived that the statement in the head-note: "The company's servants knew that children were in the habit of trespassing" is matter of inducement only. The children were trespassers at first, but became licensees by the continued acquiescence of the company's servants.—F. P.

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Nov. 27, 28.

SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION COMPANY *v.* WORCESTER CORPORATION.

THE ATTORNEY-GENERAL (AT THE RELATION OF WORCESTER CORPORATION) *v.* SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION COMPANY.

Bridge—Locomotives—Notice that Bridge is insufficient to carry Weights beyond Ordinary Traffic of District—Locomotive Act, 1861 (24 & 25 *Vict. c.* 70), *s.* 6—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 7—*Canal made across Highway—Highway carried by Bridge over Canal—Statutory Duty to keep Bridge "in sufficient repair"—Standard of Repair—Worcester and Birmingham Canal Act*, 1791 (31 *Geo.* 3, *c.* 59), *s.* 61.

Sect. 6 of the Locomotive Act, 1861, provides that it shall not be lawful for the owner of any locomotive to drive it over any bridge on which a conspicuous notice has been placed by the authority of the persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the persons liable to the repair of such bridge:—

Held, that, if the persons liable to repair a bridge have placed thereon a notice under s. 6 of the Locomotive Act, 1861, the fact that the weight of a particular locomotive does not exceed the weight of the ordinary traffic of the district does not entitle the owner of the locomotive to cause it to pass over the bridge without having previously obtained the consent of the persons liable to repair the bridge.

By a local Act passed in 1791, a canal company were empowered to make a canal, and it was provided that the company should not make the canal across any highway until they should at their own proper charges have made such bridges over the canal, and of such dimensions and in such manner as the commissioners appointed under the Act should adjudge proper; "and all such . . . . bridges . . . . shall from time to time be supported, maintained, and kept in sufficient repair" by the company.

The canal was made in 1812, and was made across several highways within a certain district; and the company constructed bridges over the canal to carry each of such highways.

In an action against the company for a declaration that they were liable under the above provision of the Act of 1791 to keep the bridges in repair so as to be sufficient to bear the traffic which might reasonably be expected to pass along the highways carried over the

canal by the said bridges having regard to the present character and needs of the district served by the said highways :—

Held, that the company were only liable to keep the bridges in repair so as to be sufficient having regard to their original construction to bear such traffic as was then ordinary on such highways.

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TRIAL of two actions before Phillimore J. without a jury.

SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION COMPANY *v.* WORCESTER CORPORATION.

By 31 Geo. 3, c. 59, s. 1, entitled an Act for making and maintaining a navigable canal from or from near to the town of Birmingham, in the county of Warwick, to communicate with the river Severn near to the city of Worcester, certain persons were incorporated by the name of "The Company of Proprietors of the Worcester and Birmingham Canal Navigation," and were authorized and empowered to make and complete the canal above mentioned.

By s. 61 of the Act the said company of proprietors were required at their own charges to make, erect, and set up and from time to time maintain and support such bridges over the canal of such dimensions and in such manner as the commissioners (appointed by s. 20 of the Act) should from time to time judge necessary and appoint; "and the said company of proprietors shall not make the said canal, or any trench, in or across any common highway, public bridleway, or footpath until they shall at their own proper charges have made and perfected such bridges, passages, or arches across such highway, bridleway, or path, and of such dimensions and in such manner as the said commissioners shall adjudge proper; and all such gates, stiles, bridges, arches, and other works and conveniences to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors."

The canal was made in or about the year 1812. It passed through the city of Worcester and was made across several common highways within the city and also several common highways then outside but now within the city. The company of proprietors erected certain bridges over the canal to carry each of the said several common highways which were crossed by the canal as aforesaid.

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By the Gloucester and Berkeley Canal Act, 1874 (37 & 38 Vict. c. clxxxi.), s. 4, the undertaking of the Company of Proprietors of the Worcester and Birmingham Canal Navigation, including the canal, bridges, and other works, were, as from January 1, 1874, vested in the plaintiffs, the Sharpness New Docks and Gloucester and Birmingham Navigation Company, subject to the obligations and liabilities of the said company of proprietors.

In 1890 the plaintiffs, in accordance with the provisions of s. 6 of the Locomotive Act, 1861 (1), being the persons liable to the repair of the said bridges, caused to be placed upon certain of the bridges a conspicuous notice that those bridges were insufficient to carry weights beyond the ordinary traffic of the district. No appeal had been made to the Local Government Board under s. 7 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29) (2), against the prohibition or restriction so placed upon the bridges. The defendants, who were the owners of two steam rollers, which weighed respectively over eleven tons and over fourteen tons, had from time to time since 1890, without having previously obtained the consent of the plaintiffs, caused their steam rollers to be driven over some of the bridges on which the notices had been placed, whereby, as the plaintiffs alleged, damage had been caused to the said bridges.

(1) 24 & 25 Vict. c. 70, s. 6: "It shall not be lawful for the owner or driver of any locomotive to drive it over any suspension bridge nor over any bridge on which a conspicuous notice has been placed by the authority of the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor of the road or bridgemaster under whose charge such bridge shall be for the time being, or of the persons liable to the repair of such bridge; . . . ."

(2) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 7: "(1.) Where the owner of a locomotive is aggrieved by any restriction or prohibition placed, either before or after the passing of this Act, on the passing of locomotives over any bridge, either under section 6 of the Locomotive Act, 1861, or under any byelaw made under this Act, or any enactment repealed by this Act, that owner may appeal to the Local Government Board, and that Board, if they consider that the bridge is sufficient to bear the weight of locomotives, and that there is no other reasonable cause for imposing the restriction or prohibition, may order the restriction or prohibition to be removed, or, if they consider that it may reasonably be varied in any respect, to be varied."

The plaintiffs claimed an injunction restraining the defendants from causing or allowing their locomotive or steam rollers to pass over or upon any of the said bridges within the city of Worcester which the plaintiffs were liable to repair.

The defence, in substance, was that the steam rollers (which were admittedly locomotives within s. 6 of the Locomotive Act, 1861) were part of the ordinary traffic of the streets and highways of the city of Worcester, and that their weight was not greater than the weights carried in the ordinary traffic of the district, and that in these circumstances it was not necessary for the defendants to obtain the consent of the plaintiffs before causing the steam rollers to pass over the bridges.

No evidence was given at the trial in support of the defendants' allegation that the weight of their steam rollers was no greater than that of the ordinary traffic of the district, because in consequence of the determination of the question of law by the learned judge in favour of the plaintiffs it became unnecessary to decide that question of fact.

Macmorran, K.C. (*E. W. Cave* and *C. K. Tatham* with him), for the plaintiffs. The effect of placing upon a bridge the notice specified in s. 6 of the Locomotive Act, 1861, is that there is an absolute prohibition against locomotives passing over the bridge, unless the owner has previously obtained the consent of the persons liable to the repair of the bridge. The fact, if it be the fact, that the steam rollers in question in this case do not exceed the weight of the ordinary traffic of the district is immaterial. If the owner of a particular locomotive is of opinion that the bridge is strong enough to carry his locomotive, his remedy under s. 6 was to have the question determined in the manner provided in the latter part of the section. That has now been repealed, and under s. 7 of the Locomotives Act, 1898, the proper course is to appeal to the Local Government Board. The defendants have not appealed against the restriction in the case of any of the plaintiffs' bridges, and, therefore, they are not entitled to cause their steam rollers to pass over them. [*Reg.* v. *Kitchener* (1) was referred to.]

(1) (1873) L. R. 2 C. C. R. 88.

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J. Sankey, K.C., and *W. W. Mackenzie*, for the defendants. The notice which may be placed on a bridge under s. 6 is not intended to constitute an absolute prohibition against locomotives passing over the bridge. It is merely an intimation that the owner of the bridge does not consider it strong enough to bear more than the ordinary traffic of the district. If the owner of a locomotive believes that it is not heavier than the ordinary traffic he may use the bridge, at his own risk and with the liability under s. 7 to make good any damage that results from his so doing. If the intention had been to apply an absolute prohibition to all locomotives irrespective of weight, there was no necessity for referring in the notice to the sufficiency of the bridge to carry the ordinary traffic of the district; a simple prohibition would have been enough, as had already been enacted in the case of suspension bridges by the first words of s. 6. The whole scheme of the Act of 1861 and of all the subsequent legislation on the subject has been to deal with the question of locomotives on highways from the point of view of weight and not by contrasting locomotives with horse-drawn traffic. It cannot have been intended that the only remedy against an undue restriction of the use of a bridge was to be by appeal against the notice. The Local Government Board might be bound to decide that a bridge was not strong enough to carry locomotives although its lack of strength was entirely due to the failure of the bridge owner to keep it up to the proper standard of repair, in which case an injunction, such as is claimed in this case, might have to be granted in favour of the person who is really in default: *Kirkheaton District Local Board* v. *Ainley, Sons & Co.* (1)

Macmorran, K.C., in reply. If a bridge is not kept in proper repair, the remedy is by mandatory injunction.

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In this case the plaintiff alleged that each of the bridges over the canal within the city of Worcester mentioned in the

(1) [1892] 2 Q. B. 274.

preceding case was out of repair and was insufficient to bear the ordinary traffic which might reasonably be expected to pass along the highways carried over the canal by the said several bridges, having regard to the present character and needs of the district served by the said highways; and that the defendants refused and neglected to keep them in repair.

The plaintiff claimed a declaration that the defendants were liable to support, maintain, and keep in repair each of the said bridges sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the highways carried over the said canal by the said several bridges, having regard to the present character and needs of the district served by the said highways. The plaintiff also claimed an injunction restraining the defendants from allowing the bridges to remain in such a condition as to hinder and endanger His Majesty's subjects from passing and repassing over and along them, and requiring them forthwith to repair them.

The defence, in substance, was that the defendants had kept the bridges in repair in accordance with their statutory obligations as hereinafter mentioned, and that they were not under any further or other liability, whether at common law or otherwise, to repair them; that they were not bound to keep the bridges in a state of repair sufficient to bear the ordinary traffic which might reasonably be expected to pass along the highways carried over the canal by the bridges having regard to the present character and needs of the district served by the said highways, but only so as to carry such traffic as was ordinary on such highways when the bridges were originally constructed; and they did not deny their liability to keep the bridges in repair so as to be sufficient for that purpose.

At the hearing the defendants admitted that some of the bridges in question required repairs so as to make them sufficient to bear the traffic which was ordinary on the said highways at the time when the bridges were constructed, but they said that they had not carried out those repairs because the corporation of Worcester claimed that a much higher standard of repair, based upon the present character and needs of the district, was necessary, and it was considered advisable, before expending money in

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repairs, that the dispute as to the standard of repair should be determined.

J. Sankey, K.C., and *W. W. Mackenzie*, for the plaintiff. The defendants are bound, under s. 61 of the Worcester and Birmingham Canal Act, 1791, to repair the bridges over the canal so as to make them sufficient to carry the traffic of the present day. By that section all such bridges "shall be supported, maintained, and kept in sufficient repair" by the Company of Proprietors of the Canal Navigation. "Sufficient repair" means sufficient repair according to the requirements from time to time of the traffic which may reasonably be expected to pass over them. The requirements of the present day, that is to say, the requirements of the traffic at the time when the question of repair arises, are the test. In *Rex* v. *Kerrison* (1), where certain persons were authorized by statute to make a river navigable, and for that purpose to cut the soil of any persons for making a new channel, and they cut through a highway and a bridge was erected over the channel to carry the highway, it was held that, there being a duty upon them to erect a bridge over the channel, they were bound to repair it. In *Manley* v. *St. Helen's Canal and Ry. Co.* (2) it was held that the defendants were bound to maintain a bridge over their canal sufficient with reference to the present day requirements so as to be safe for the public who used it. Martin B., agreeing with an observation of Pollock C.B. (3), said (4): "It is perfectly clear what is the common law obligation of persons who make canals of this kind. They may make a bridge, but common sense points out it must be a proper bridge, and fit for travelling over; and I agree with the Lord Chief Baron that, if we were now discussing what kind of bridge it ought to be, I should say a bridge suitable to the present state of society. I have no doubt that, when this bridge was built, the place near it was a small village; now it has thousands of inhabitants; and to hold that the same bridge which would suffice formerly will do so now, when the place has become a great manufacturing town, would be utterly contrary to reason

(1) (1815) 3 M. & S. 526.
(2) (1858) 2 H. & N. 840.
(3) Ibid. at p. 849.
(4) Ibid. at pp. 850, 851.

and good sense. Courts of law must look at these matters with reason and common sense, and these tell us that undertakings of this sort must be conducted so as to meet the exigencies of society." In *Attorney-General* v. *Scott* (1) the county council claimed an injunction to restrain the defendant from using a traction engine on a road in such a way as to cause a public nuisance. It was proved that the condition of the road was not caused primarily by the defendant's traction traffic, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic, including the traction traffic, which was not more unusual or onerous than they ought to have expected to come along it. Jelf J. and the Court of Appeal held that the plaintiffs were not entitled to the injunction. That decision involved this, that it was the duty of the county council to maintain the road up to present day requirements; that there was a duty on the county council, in the language of Jelf J. (2), "to maintain the road according to an up-to-date standard."

[PHILLIMORE J. The Court of Appeal merely held that there was nothing to shew that the condition of the road was caused by the use of the traction engine, which was an ordinary user of the road. The observation of Jelf J., no doubt, went further.]

The damage to the road was really caused by its not being kept up to modern requirements. In *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (3), which related to the liability of a railway company to repair the approaches to a level crossing where the old highway had been raised so as to bring it up to the level of the railway, Fletcher Moulton L.J. said (4): "In my opinion the law as settled by the cases of *Rex* v. *Inhabitants of Kent* (5), *Rex* v. *Inhabitants of the Parts of Lindsey* (6), *Rex* v. *Kerrison* (7), and *Reg.* v. *Inhabitants of Isle of Ely* (8) practically amounts to this: that, where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible

(1) [1905] 2 K. B. 160.
(2) Ibid. at p. 168.
(3) [1909] 2 K. B. 403.
(4) Ibid. at p. 412.
(5) (1811) 13 East, 220.
(6) (1811) 14 East, 317.
(7) 3 M. & S. 526.
(8) (1850) 15 Q. B. 827.

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for the public to use it, an obligation is prima facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and that the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance." The statement that the obligation is "of a continuing nature" means that the works must be maintained from time to time up to the requirements of the day. Lord Alverstone C.J. (1) deduced the same principle from the authorities, namely, that in such a case there was "the further obligation of keeping the substituted convenience in repair," by which he must have meant in repair to meet the requirements of the day. The words "sufficient repair" in s. 61 of the Act in the present case mean such repair as is sufficient to bear the traffic which may reasonably be expected to pass over the bridges from time to time. The Legislature, in authorizing the company to interfere with a highway by cutting a canal across it and carrying the highway over the canal by a bridge, imposed upon them the obligation of keeping the bridge in repair so as to allow the public for all time to pass with their vehicles over the bridge. The Act contemplated an obligation towards future generations to keep the bridge up to the requirements of the day. Otherwise there might, in respect of the same highway, be a number of obligations to repair the bridges over the canal varying according to the date of the construction of each bridge. By s. 51 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), a railway company is under an obligation to widen a bridge carrying a road over the railway up to a certain limit if at any time after the construction of the railway the average width of the road is increased beyond the width of the bridge; and in *Rhondda Urban District Council* v. *Taff Vale Ry. Co.* (2) it was held that "bridge" meant the bridge over the railway and did not include the approaches thereto. In *Nottingham County Council* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) it was held that the proprietors of a canal were bound to repair the approaches to a bridge which they had

(1) [1909] 2 K. B. at p. 409. (2) [1909] A. C. 253.
(3) (1894) 71 L. T. 430.

constructed to carry a highway over their canal. The consideration for allowing the company in the present case to interfere with the highway was that they should keep the bridges carrying the highway over the canal up to the requirements of the time. It is clear that the highway authority must repair a highway with reference to the existing user of it: *Reg.* v. *Inhabitants of Henley* (1); and the same principle must apply to that part of the highway which is carried over the canal by a bridge, otherwise the traffic of the district would be obstructed. *Reg.* v. *East and West India Dock Co.* (2) is not against this view, because in that case the traffic was abnormal and extraordinary. The plaintiff here only contends that the bridges shall be kept in repair to carry the normal traffic of the road. Therefore both upon principle and upon authority the defendants are bound to keep the bridges carrying the highway over the canal in such a state of repair as to carry the traffic which may from time to time reasonably be expected to pass along it, in other words, to keep their part of the highway in a state of repair similar to that of the rest of the highway. The plaintiff is therefore entitled to succeed. [*Rex* v. *West Riding of Yorkshire* (3) was also referred to.]

Macmorran, K.C., and *E. W. Cave* (*C. K. Tatham* with them), for the defendants. There is no question here of a common law liability to repair these bridges. The question is as to the statutory liability. The construction of this canal, as appears from the recitals in s. 1 of the Act, was authorized by Parliament for the public benefit, though no doubt the company of proprietors were authorized to charge rates for the carriage of goods on the canal. Sect. 61 must be construed in that light. By that section the company of proprietors had to build such bridges over the canal, of such dimensions and in such manner, as the commissioners appointed under s. 20 for settling differences under the Act should adjudge proper, and "all such bridges shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors." There being an express statutory obligation

(1) (1847) 10 L. T. (O.S.) 110. (2) (1888) 60 L. T. 232.
(3) (1787) 2 East, 353, n.

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to repair, no common law obligation arises. Where a person is authorized by statute to cut a canal across a highway, he must construct a convenient bridge across the canal to carry the highway, and must keep that bridge in repair. There is no authority to the effect that he is compelled to construct a new and different bridge whenever owing to an alteration in the nature of the district or from some other cause the traffic along the highway alters. *Rex* v. *Kerrison* (1) only dealt with the common law liability to repair a bridge constructed to carry a highway across a cut. The obligation to repair a bridge is different from the obligation to repair a highway. In the latter case the obligation is to keep it fit for the present day traffic which may reasonably be expected to come along it. In *Rex* v. *Inhabitants of Devon* (2) it was held that the inhabitants of a county, who at common law were bound to repair a bridge, were under no obligation to widen it so as to meet the requirements of present day traffic. The judgment of Bayley J. (3) shews that the obligation is to keep the bridge in the state in which it was when dedicated to the public. It has never been suggested, in the case of the bridges across the Thames in and near London, many of which have become too narrow for the traffic, that there is any common law obligation upon the highway authority to widen them. In *Manley* v. *St. Helen's Canal and Ry. Co.* (4) the question was as to the liability of the defendants for negligently leaving a swivel bridge, which carried a public road over their canal, open and with the opening unfenced and unprotected, whereby a person who was walking along the road fell into the canal and was drowned. That was an action of negligence and throws no light upon the present case. In *Attorney-General* v. *Scott* (5) the only question was as to whether the plaintiffs were entitled to an injunction to restrain the defendant from bringing his traction traffic along the highway. It is admitted that the duty of the highway authority is to maintain the roads in their district in a condition fit for the traffic which may reasonably be expected to pass along them. Even so,

(1) 3 M. & S. 526.
(2) (1825) 4 B. & C. 670.
(3) Ibid. at p. 679.
(4) 2 H. & N. 840.
(5) [1905 2 K. B. 160.

it does not follow that all roads must be maintained in a condition fit for the passage of a traction engine. The case of a bridge is different from that of a highway. The only statutory obligation as to the bridges over this canal is to maintain them in such a condition as was suitable for the traffic at the time they were constructed. *Rex* v. *Inhabitants of Surrey* (1) shews that a parish, which had always repaired a wooden bridge alongside a ford, which was chiefly used by persons on foot, but over which carts passed in times of flood, could not be compelled to repair a new brick bridge, which was constructed in its place by the trustees of the adjoining turnpike road and over which carriages passed at all times. In *Rhondda Urban District Council* v. *Taff Vale Ry. Co.* (2) the only question was as to the liability to widen the approaches to a bridge; there was no question as to standard of repair. *Reg.* v. *East and West India Dock Co.* (3) is a direct authority that a dock company, which had statutory authority to build bridges over their docks and built bridges sufficient to carry the traffic of the time, were not bound to build new bridges to carry the very heavy traffic which sprung up later. In the present case the commissioners adjudged what bridges were proper, and the company built them. If a heavy timber or motor traffic sprung up in the district, the canal company would not be bound to construct new bridges to carry that traffic. The character of the traffic might vary every few years. It would be unreasonable to construe the words "sufficient repair" in s. 61 of the Act of 1791 as meaning sufficient for the traffic which might from time to time be expected to pass over the bridges. It is sufficient if the structure is maintained up to the standard when the bridges were built. If the highway authority require a stronger bridge they must provide it themselves. The expression "such bridges" at the end of s. 61 refers to the bridges specified in the earlier part of the section, that is, the bridges which the commissioners judged to be proper. The words "such bridges" occurred in the Act under discussion in *Nottingham County Council* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (4) and were held to mean such bridges to be made

(1) (1810) 2 Camp. 455.
(2) [1909] A. C. 253.
(3) 60 L. T. 232.
(4) 71 L. T. 430.

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and perfected by the canal company over the canal as the commissioners should adjudge proper, and therefore to include the approaches to the bridge which were necessary for carrying the highway over the bridge.

J. Sankey, K.C., in reply. In *Rex* v. *Inhabitants of Devon* (1) the only question was whether the highway authority were under any obligation to widen a bridge; and in *Rex* v. *Inhabitants of Surrey* (2) the dispute was whether the county or the parish was liable to repair the bridge. No question arose as to the standard of repair. [*Birmingham Canal Co.* v. *Hickman* (3) was also referred to.]

PHILLIMORE J. The first of these two actions is brought by the Sharpness New Docks and Gloucester and Birmingham Navigation Company against the corporation of the city of Worcester, and the material facts, which are admitted, are as follows:—The plaintiff company is the successor of an old canal company and is liable to repair certain bridges over the canal in the city of Worcester. On some of these bridges the company has placed the conspicuous notice required by s. 6 of the Locomotive Act, 1861, and the defendant corporation has, without the consent of the plaintiff company, taken its two steam rollers, weighing respectively eleven and fourteen tons, over some of the bridges on which the notice has been placed. The plaintiff company seeks under s. 6 of the Act of 1861 an injunction to restrain the defendant corporation from so doing.

Since the passing of the Act of 1861 there have been other statutes and orders made thereunder containing provisions which have removed in the case of some locomotives some of the prohibitions and conditions imposed by the Act of 1861, but these provisions do not affect locomotives of the character and weight of these steam rollers, and, therefore, with regard to them I have to consider the language of s. 6 of the Act of 1861. The preamble of that Act recites as follows: "Whereas the use of locomotives is likely to become common on turnpike and other roads: And whereas the General Turnpike and Highway Acts and many of the

(1) 4 B. & C. 670. (2) 2 Camp. 455.
(3) (1891) 7 Times L. R. 646.

Local Turnpike Acts do not contain any provisions for regulating the use of locomotives on the roads to which they respectively apply, nor do they authorize the levying of tolls upon or in respect of any locomotive using the roads, or upon or in respect of any waggon or carriage drawn by locomotives: And whereas under and by virtue of certain Local Turnpike Acts tolls may be levied upon locomotives and other engines drawing or propelling waggons or carriages, or upon the waggons or carriages so drawn or propelled, which are or may be prohibitory of the use of locomotives on the roads to which the said Acts respectively apply: And whereas the weighing clauses in the General Turnpike Acts have not been framed in anticipation of traffic by locomotives, and are in many respects ill adapted to the profitable carrying of goods, or to the levying of just and adequate tolls upon waggons or carriages drawn by locomotives: And whereas it is desirable that the use of locomotives on turnpike and other roads should be regulated by uniform general provisions, and that tolls should be levied upon such locomotives and the waggons or carriages drawn by such locomotives upon turnpike roads."

The Act then proceeds in ss. 1 and 2 to provide a scale of tolls to be taken after the passing of the Act. In ss. 3 and 4 there are provisions as to the weight of locomotives, as to the weight upon each pair of wheels, and as to a certain corresponding breadth of wheel having regard to the weight. Sect. 5 enables the Secretary of State to prohibit the use of locomotives which are destructive to highways or dangerous to the public. Sects. 8, 9, 10, and 11 provide certain regulations as to steam, lights, persons in charge, and speed. Sects. 12 and 13 are to a large extent saving clauses. There remain ss. 6 and 7. Sect. 7 provides that if a locomotive passes over any bridge on a turnpike or other road and damages the bridge, the persons interested in or having the charge of the bridge shall not be liable to repair the damage, but the damage shall be repaired at the expense of the owner of the locomotive. That is a general section and it would apply to cases where the locomotive was either lawfully or unlawfully passing over the bridge. Sect. 6 is as follows: "It shall not be lawful for the owner or driver of any locomotive to drive it over any suspension bridge,"—that is an absolute

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prohibition—"nor over any bridge on which a conspicuous notice has been placed, by the authority of the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor of the road or bridgemaster under whose charge such bridge shall be for the time being, or of the persons liable to the repair of such bridge." That seems to be a plain provision. If the persons liable to the repair of the bridge—I omit other cases which do not touch this point—place a particular conspicuous notice upon the bridge, it is not lawful to drive the locomotive over the bridge without their consent. But it is said on behalf of the defendants that, if you consider what the notice says, the section cannot have that simple meaning, for the notice does not say that the persons liable to repair the bridge do not want any locomotives, or only locomotives of a certain weight, to pass over the bridge, but that the bridge is insufficient to carry weights beyond the ordinary traffic of the district; and therefore if the weight of a particular locomotive does not exceed that of the ordinary traffic it would be absurd to treat the notice as prohibiting that locomotive from using the bridge. There is some force in that objection, and a notice in these terms does not appear to be the most convenient way of preventing locomotives, or locomotives of a certain class, from going over bridges. But I can see reasons why in 1861 the Legislature should have decided to require the notice to be in this form. I do not suppose that when enacting this section the Legislature was thinking of locomotives of light weight, for a reason which I will state in a moment. I put aside one view of the question, that with approximately equal weights the stress or strain of a locomotive may be harder for a bridge to bear than the stress or strain of a horse-drawn waggon, or may have been supposed to be harder in the state of engineering science in 1861. Putting that view aside and for the moment assuming that wherever a waggon can go a locomotive of equal weight can go, one can see why, having regard to the state of things in England in 1861, it was quite reasonable that the notice should be worded in the way required by s. 6. In 1861 most of the bridges over which locomotives would require to pass were bridges carrying turnpike roads, or, if

not, were bridges belonging to companies or proprietors who had a right to levy tolls. No proprietor of a turnpike road, or a toll-bearing bridge, would object to a locomotive which was not likely to impose a greater stress upon the bridge than a waggon would do. The owner of the bridge would have his toll, and the more vehicles, locomotives or others, that came over the bridge the better for him, and the Legislature would not contemplate that there might be curmudgeons who would merely for the sake of obstruction prevent the lighter locomotives from using a bridge. It is true there might be a class of case where, in consequence of the liability to repair a bridge resting upon some individual ratione tenuræ, no profit would be obtained by allowing a locomotive to use the bridge, but those cases would be very few. Therefore it is notified to the owners of locomotives in a not very inconvenient way that if their locomotives are heavier than the ordinary traffic of the district they must not pass over the bridge. If the locomotives were no heavier than the ordinary traffic, either the consent of the owner of the bridge could be obtained, or it might be assumed there would be no objection to the locomotive passing over the bridge. In any case the fact that the notice is to be in a somewhat curious form cannot in my opinion affect the very plain language of the section. The Legislature was obviously contemplating locomotives that would be heavier than the ordinary traffic of the district, and one can see that, if the notice were required to state the weight which the bridge would bear, difficulties might arise in ascertaining the actual weight of a particular locomotive plus the load it was carrying or drawing, and therefore it was considered that it would be a not inconvenient manner of dealing with the question to put, as it were, the burden on the owner of the locomotive of obtaining the consent of the owner of the bridge before the locomotive could be permitted to pass. I now pass to the second half of s. 6: "and in case such owner of the locomotive and surveyor of the road or bridge, or bridgemaster, shall differ in opinion as to the sufficiency of any bridge to sustain the transit of the locomotive, then the question shall be determined by an officer to be appointed, on the application of either party, by one of Her Majesty's principal Secretaries of State, whose

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certificate of sufficiency of such bridge shall entitle the owner of the locomotive to take the same over such bridge." In this part of the section there is no mention of the suggested limit of power of the bridge to carry the weights of the ordinary traffic of the district. The appointed officer has to test whether the bridge will in fact, not whether it ought to, bear the particular locomotive in question, and, if it will, then it is permitted to go over the bridge. This latter part of s. 6 has been repealed by the Locomotives Act, 1898, s. 7 of which Act gives a right of appeal to the Local Government Board, "and that Board, if they consider that the bridge is sufficient to bear the weight of locomotives, and that there is no other reasonable cause for imposing the restriction or prohibition, may order the restriction or prohibition to be removed, or, if they consider that it may reasonably be varied in any respect, to be varied." There, again, the question is not whether the bridge is up to the standard of a highway bridge, or whether it is sufficient to bear the weight of the ordinary traffic of the district, but whether it is sufficient to bear the weight of the locomotives which are being considered at the moment. I may add that, although the point was not distinctly present to the Court of Crown Cases Reserved in *Reg.* v. *Kitchener* (1), Kelly C.B., who was a man of almost pedantic accuracy in the words which he used in his judgments, certainly seems to have taken the same view of s. 6 as I have done.

For these reasons I think that in the first case the plaintiffs are right. In the circumstances of the case I do not think that it is necessary to grant an injunction; it will be sufficient if I grant a declaration that the defendants are not entitled to cause their steam rollers to pass over the bridges in question.

In the second case, the Attorney-General, at the relation of the corporation of Worcester, is suing the canal company and asking for "a declaration that the defendants are liable to support, maintain, and keep in repair each of the said bridges, sufficient to bear the ordinary traffic of the district, and the traffic which may reasonably be expected to pass along the highways carried over the said canal by the said several bridges, having regard to

(1) L. R. 2 C. C. R. 88.

the present character and needs of the district served by the said highways," and then an injunction restraining them from allowing the bridges to remain in such a condition as to hinder the passing of His Majesty's subjects. The case is launched upon the local Act of 1791, 31 Geo. 3, c. 59, s. 61 being the section specially relied upon. That Act authorized the making of the canal, and s. 61 provides that the said company of proprietors shall not make the said canal in or across any highway "until they shall at their own proper charges have made and perfected such bridges, passages, or arches across such highway . . . . of such dimensions and in such manner as the said commissioners shall adjudge proper; and all such . . . . bridges, arches, and other works and conveniences to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors." With regard to that the defendants admit, first of all, that they are liable to make these bridges up to the standard required at the time they were made, that is, to bring them and keep them in that state of repair which one may presume was the state in which they were first approved, and they admit now, though it was not admitted in their defence, that some of these bridges will require repairs to bring them up to that standard. They do not admit that this is true of all. They say—and there is some reason in what they say—that they would have made the repairs but for this action, pointing out that it would be useless to repair a bridge if they had substantially to rebuild it; and that the claim of the Attorney-General in this action that the bridges shall be brought up to the standard of the present day, that is, to bear such traffic as may reasonably be expected to pass along such roads and bridges at the present day, may involve the rebuilding of some of the bridges. It was therefore agreed between counsel that the real matter to be determined is whether the standard at the date of construction or the standard of the present day is to apply as to the efficiency, suitability, and strength of these bridges, and that it would be enough for this purpose if I were to declare which is the standard to be applied.

This raises a very interesting question, which I do not think is covered by authority. The statute has imposed upon the proprietors of the canal the liability not only to build sufficient

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bridges, but from time to time to support, maintain, and keep them in sufficient repair. Analogies from the common law are rather dangerous. Some cases have been cited where the common law has been stated in this way. If a body of proprietors or adventurers obtain statutory power to interrupt a highway by making a cut across it, there is an implied condition, in the absence of any statutory provision on the point, that they will make and maintain a bridge over the cut to carry the highway. The obligation to make and maintain a bridge follows from the power to make the cut. That may well be, and if the clause here about repairing the bridges was not in this Act, I should still be disposed to hold that it was the duty of the canal company to repair that which they were bound to build. That, however, does not advance the case beyond agreed ground. The question remains, what is the standard of repair, and the plaintiff relies upon the judgment of Jelf J. in *Attorney-General* v. *Scott* (1), and upon the language of Martin B., and to a certain extent the language of Pollock C.B., in *Manley* v. *St. Helen's Canal and Ry. Co.* (2) With regard to the latter of these cases, the language of Pollock C.B. does not go the length that the plaintiff contends for, and Martin B. professes to be only adopting the reasoning of the Lord Chief Baron. That case does go as far as this, that where canal owners have cut through a public highway for the purpose of making the canal and have constructed a swing bridge to carry the highway over the canal, so that the bridge when open may be a source of danger to the public, their liability to fence or light or warn against the danger is to be measured by the present state of circumstances, and not by the state of circumstances existing at the time when the swing bridge was originally built. I doubt whether that is of any assistance in this case, but the decision goes as far as that. In *Attorney-General* v. *Scott* (3) Jelf J., who founded himself apparently upon certain cases which were cited to him, and of which one only has been relied upon before me, spoke of the duty of a highway authority to maintain a highway according to an up-to-date standard, and one case to which he referred—*Reg.* v.

(1) [1905] 2 K. B. 160. (2) 2 H. & N. 840, at pp. 849, 850, 851.
(3) [1905] 2 K. B. 160, at p. 168.

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Inhabitants of Henley (1)—does say that it may be the duty of the highway authority to convert a green road into a hard road if the existing necessities of the traffic so require. I understand that counsel for the defendants do not dispute that it is the duty of the highway authority to maintain the road, as apart from the bridge, in a state of repair sufficient for the traffic which may reasonably be expected from time to time to pass along it. I am not quite certain that I agree. I think that the same result substantially is reached, but in a different manner. It is the duty of the highway authority to keep a road in repair. If the highway is out of repair, it is no answer for the highway authority to say that the mischief has been done, not by their own neglect, but by the positive act of some other person, except in cases where the tortious act of that other person has been so recent that there has not been time to make it good. The road has to be kept in repair, and if somebody has misused the road so as to put it out of repair it is none the less the duty of the highway authority to bring it back into a state of repair. Their remedy is a remedy against the person who has wrongfully put it out of repair. Therefore, if the road is reasonably fit for horse-drawn traffic, and if for the first time a locomotive of heavier weight than any horse-drawn traffic passes along it and damages it, whatever complaint the highway authority may have against the owner of the locomotive, they must restore the road to the condition in which it was before the locomotive passed along it. If they choose they may go on doing that as often as the damage occurs, but if locomotives are likely to be frequent in their visits it would be absurd to go on continually repairing the road so as merely to bring it back to its former condition ; and therefore if locomotives are entitled to pass along the road, inasmuch as the highway authority are bound to maintain the road in a state of repair, they will have from motives of ordincary economy to bring the road as soon as possible into a state to bear locomotives, and therefore in that way the highway authority end by bringing the road up to date. I do not decide it, but I have some little doubt whether they are under a direct obligation to

(1) 10 L. T. (O.S.) 110.

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maintain the road in a fit state for traffic of modern requirements. I have some doubt whether an indictment could be maintained against them by the owner of a locomotive who said "I came with my locomotive to the edge of your highway and I could not come along it because, although it may be sufficient for any waggon or even for locomotives which were authorized in the year 1861, it is not sufficient for the heavier locomotive which I am now in the year 1912 authorized to drive along the road." If, however, the locomotive did pass along the road and tore it up, I think that the next waggon owner who desired to pass along it with his waggon would be able to say that the road must be restored to such a condition that his waggon could pass along it. Assume, however, that the obligation is to repair a road so as to make it fit for the traffic which may reasonably be expected from time to time to pass along it, two steps have to be traversed before that affects the defendants, the canal company. It has first to be shewn that that duty with regard to a road applies equally to a bridge, and there are many practical considerations which render that difficult. The highway authority can go on putting fresh materials upon a road, and although to a certain extent they may have to dig out imperfect materials and put down more substantial ones, they do not pull the road down and rebuild it in making the surface fit for traffic of heavier weight. They may in some cases, no doubt, underpin or in some way strengthen piers and buttresses and abutments of a bridge so as to make it bear greater weights than it otherwise would, but if I am not mistaken a point will be reached when nothing will serve but to pull down the old bridge and rebuild it. There is, so far as I know, no authority for the proposition that a highway authority are bound to make a new bridge to carry that traffic which in the ordinary course is entitled to travel along the rest of the road, and in *Rex* v. *Inhabitants of Devon* (1), where it was held that the obligation of a county to repair a bridge did not include the obligation to widen it, there is language used by the judges which points to that question having been in the minds of the judges, and their having regarded it in the same way as I am now regarding it. I do not see any great

(1) 4 B. & C. 670.

distinction between lateral extension by doubling the width of a bridge and double strength. I do see the distinction in the case of the lateral extension of a highway, because, as was pointed out by Abbott C.J. in the above case, the inhabitants of a parish would have to buy land to widen a road, which they have no power, except by statute, to do, and therefore they would have to acquire it as best they could. But with regard to lateral extension of a bridge I do not see much distinction between the proposition that the highway authority are not bound to convert a bridge of the old-fashioned sort, which is only of sufficient width to take one line of vehicles at a time, with safety corners for foot passengers, into a double bridge—which it is clear that they are not bound to do—and the proposition that a highway authority are not bound to pull down that bridge and rebuild it of greater strength. The second step which has to be traversed is this. Even assuming that it is the duty of a highway authority at common law to rebuild a bridge because the old one is not strong enough, it has next to be shewn that the statutory liability of this canal company is as great. That does not at all follow. If it were so, the burden upon the canal company would be enormous. There are many bridges in Worcester. There must be a large number of bridges throughout the length of this canal, which traverses a populous neighbourhood where there are many roads. One may well suppose that many of them were built of no greater strength than was necessary to carry the extreme traffic in the year 1812 when the canal was made, and it must be further remembered that since 1861 locomotives have increased in weight, and the burden upon a canal company of possibly rebuilding a great number of these bridges would be extremely heavy. The business difficulty which is pointed out on behalf of the Attorney-General, namely, the danger of obstructing the locomotive traffic practically throughout this district, would best be met, as it seems to me, by a private Act of Parliament, or by some arrangement under which the highway authorities either assist the canal company to build new bridges or take upon themselves the burden of rebuilding the bridges, receiving compensation from the canal company measured by the relief from their liability.

I think that I have referred to the principal cases which seem to bear upon the point, and for the reasons I have given I do not

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think that there is any liability on the canal company to bring their bridges up to the extreme standard which is contended for on behalf of the Attorney-General. They are not, in my opinion, bound to keep in repair each of the bridges sufficient to bear "the ordinary traffic of the district and the traffic which may reasonably be expected to pass along the highways carried over the said canal." But before I pass from that I wish to point out that there are two different standards specified in the declaration claimed. The bridges are to be sufficient to bear the ordinary traffic of the district and the traffic which may reasonably be expected to pass along the highways. I feel clear in my mind that, if the Attorney-General were right, the second of these standards would be the utmost liability of the canal company. The question would not be whether each road was sufficient to bear the ordinary traffic of the district; it would be whether it was sufficient to bear the traffic which might reasonably be expected to pass along it. If there is any distinction, that which is the lesser standard would, in my opinion, be the nearer to that which is right. However, for the reasons I have given I do not think that the Attorney-General is entitled to that declaration. He is entitled to a declaration—because the parties have put themselves at issue to that extent—that the canal company are liable to support, maintain, and keep each of the said bridges—following the words of the statute—in sufficient repair. I think probably that would be enough; but perhaps it would be better to say, in sufficient repair having regard to their original construction, and if it is desired the Attorney-General can have a declaration to that effect.

Judgment accordingly.

Solicitors for plaintiffs in first and defendants in second action: *Burton, Yeates & Hart, for Johnson & Co., Birmingham.*

Solicitors for defendants in first and plaintiff in second action: *Church, Rendell, Bird & Co., for S. Southall, Worcester.*

F. O. R.

W. F. B.

[IN THE COURT OF APPEAL.]

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Revenue—Practice—Appeal—Mineral Rights Duty—Assessment—Decision of Referee—Commissioners of Inland Revenue—Right to appeal to High Court on "conditions directed by Rules of Court"—Rules as to Appeals by Subject only—"Any person aggrieved"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 33, *sub-s.* 4—*Rules of the Supreme Court* (*Finance* (1909-10) *Act*), 1911—*Revenue Act*, 1911 (1 *Geo.* 5, *c.* 2), *s.* 7.

By s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, "any person aggrieved" by the decision of a referee under the Act may appeal to the High Court "within the time and in the manner and on the conditions directed by Rules of Court." Rules, dated January 16, 1911, were made under the section, some of which appeared to be framed to meet the case of an appeal by the subject and did not apply to an appeal by the Commissioners of Inland Revenue.

By s. 7 of the Revenue Act, 1911, which received the Royal assent in March, 1911, it was declared that the Commissioners of Inland Revenue had a right of appeal to the High Court as "persons aggrieved" under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910:—

Held, that the Commissioners' right of appeal was absolute, and not affected by the omission from the Rules of complete, exhaustive, or appropriate provisions as to the procedure upon an appeal by the Commissioners.

Decision of Horridge J. reversed.

APPEAL by the Commissioners of Inland Revenue from a decision of Horridge J.

Sect. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, provides that "any person aggrieved" by the decision of a referee under the Act may appeal against that decision to the High Court "within the time and in the manner and on the conditions directed by Rules of Court (including conditions enabling the Court to require the payment of or the giving of security for any duty claimed)."

On January 16, 1911, rules were made by the Rule Committee regulating proceedings in appeals to the High Court under the Act. These rules were entitled "Rules of the Supreme Court (Finance (1909-10) Act), 1911" (1), and came into operation on February 1, 1911. They provided (r. 1) that appeals should

(1) These rules will be found printed in [1911] W. N., p. 51.

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be by petition; (r. 2) that the petition should be filed within one month of the referee's decision, and that a copy should be served by the appellant upon the Commissioners within seven days after the filing of the petition. The rules then went on to make elaborate provision for the conduct and hearing of the proceedings upon the appeal, including such matters as notice of admissions, setting down for hearing, evidence at hearing, discovery, extension of time for appealing, and service of documents, &c. Some of the rules appeared to be framed to meet the case only of an appeal by the subject and did not aptly apply to an appeal by the Commissioners. Others of the rules contained conditions applicable to every appeal whether by the subject or by the Commissioners. (1) By the Revenue Act, 1911, s. 7, it was declared that the Commissioners of Inland Revenue, if dissatisfied with the decision of a referee, had, under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, a right of appeal to the High Court as "persons aggrieved" within the meaning of that provision. This Act received the Royal assent in March, 1911.

The respondent having been assessed to mineral rights duty appealed under s. 33, sub-s. 1, of the Finance (1909-10) Act, 1910, to the referee, who held that he was not properly assessable to the duty.

The Commissioners appealed by way of petition to the High Court, and took all the steps analogous to those which were prescribed by the rules in the case of an appeal by the subject.

At the hearing of the petition before Horridge J. on December 6, 1912, the respondent took the preliminary objection that the rules did not provide for the case of an appeal by the Commissioners, and consequently that the appeal could not be heard.

The judgment of HORRIDGE J. was as follows:—A preliminary objection was taken to my hearing this appeal on the ground that there is no machinery by which the Commissioners of Inland

(1) Note.—Since the hearing and determination of this case the rules in question have been, by the Rules of the Supreme Court (Finance (1909-10) Act), 1912, rendered applicable to an appeal by the Commissioners of Inland Revenue. See [1912] W. N., p. 492.

Revenue if dissatisfied with the decision of a referee can appeal to the High Court.

The matter stands in this way. By sub-s. 4 of s. 33 of the Finance (1909-10) Act, 1910, it is provided that any person aggrieved by the decision of the referee may appeal against the decision to the High Court within the time and in the manner and on the conditions directed by Rules of Court (including conditions enabling the Court to require the payment of or the giving of security for any duty claimed). Rules of Court dated January 16, 1911, were made under the section, but those rules make provision only for an appeal by the subject, to which the Commissioners of Inland Revenue are respondents. By the Revenue Act, 1911, s. 7, it was declared that the Commissioners of Inland Revenue if dissatisfied with the decision of a referee have a right of appeal to the High Court against the decision as persons aggrieved within the meaning of sub-s. 4 of s. 33 of the principal Act.

This is merely declaratory of the fact that the Commissioners were persons aggrieved within sub-s. 4 of s. 33 of the Finance (1909-10) Act, 1910. At the passing of this later Act the Rules of Court which I have referred to were in existence, and if it was intended to make the rules already in existence apply to appeals by the Commissioners one would have expected some words directing that they should apply mutatis mutandis.

In the absence of any authority to that effect I do not see any ground for saying that in law the rules which had been passed by the authority of the Rule Committee can be altered by me to fit a different appeal, and this is sufficient to dispose in favour of the respondents of the preliminary point.

I may say also that I feel difficulty in applying the rules mutatis mutandis, inasmuch as the first rule requires the appellant to state in his petition the address at which documents can be served upon him, and by r. 15 all documents required or authorized to be served upon or sent to him were sufficiently served or sent if sent by post in a prepaid letter to him at his address for service as stated in the petition. As regards the Commissioners, documents may be served upon them at Somerset House, but there is no provision for saying to what address

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documents may be sent for service on the subject if he be in the position of a respondent, and the only way, apart from agreement between the parties, to make the rule work would be to make personal service upon the respondent obligatory. As the appeal is only given by the section within the time and in the manner and on the conditions directed by Rules of Court, and there are no Rules of Court fixing the time, manner, or conditions as regards the Commissioners, I do not see how I can entertain the appeal.

The appeal must therefore be dismissed with costs.

From this decision the Commissioners appealed.

Dec. 13. *Sir J. Simon, S.-G., Austen-Cartmell,* and *W. Finlay,* for the Commissioners. By the Revenue Act, 1911, s. 7, it is declared that the Commissioners of Inland Revenue if dissatisfied with the decision of a referee have a right of appeal to the High Court as persons aggrieved within s. 33, sub-s. 4, of the principal Act. It is now said, and Horridge J. has so held, that the Commissioners have no such right of appeal, and that this appeal cannot consequently be heard upon the merits. The right of appeal which is declared by the statute to exist cannot be taken away by the mere fact that the rules regulating the procedure with reference to such appeals do not exactly fit every case.

The Commissioners in this case have taken all the steps analogous to those which would have to be taken by the subject if he were appealing. It is admitted that r. 14 of the Rules is limited to a case where the subject is appealing, and does not apply where the Commissioners are appealing, but practice rules are to be regarded as "handmaid rather than mistress," as was said by Collins L.J. in *In re Coles and Ravenshear.* (1)

The right of appeal is not given subject to any condition precedent, and it is not taken away by the mere absence of directions in the rules as to the procedure upon appeal.

[HAMILTON L.J. referred to *Ashby* v. *White.* (2)

FARWELL L.J. Is not the right of appeal given subject to such conditions (if any)?]

It is submitted that that is the right view. Assuming that no

(1) [1907] 1 K. B. 1, 4. (2) (1703) 2 Ld. Raym. 938.

absolute right of appeal is given except subject to conditions, those conditions have been satisfied. Again assuming that s. 33, sub-s. 4, was only intended to apply to the case of the subject; that being so, the rules have done what is necessary. The rules are read into s. 33, sub-s. 4. The Act of 1911 then provides that the Commissioners shall have the benefit of the expanded section. If the rules do not cover every case, the general rules of practice will apply, and by Order LXXII., r. 2, of the Supreme Court Rules, "where no other provision is made by the Acts or these Rules, the present procedure and practice remain in force." The condition which has to be fulfilled in order to make the right of appeal absolute has been complied with.

Danckwerts, *K.C.*, and *A. T. Bucknill*, for the respondent. Rebus sic stantibus the Commissioners cannot appeal. The natural construction must be put upon the rules. The Act of 1911 provides that the Commissioners shall have the right of appeal which is given by s. 33, sub-s. 4. The whole question is, what is that right? Neither the subject nor the Crown could have appealed apart from the Rules of Court. There is no absolute right of appeal at all. The rules were to prescribe time, manner, and conditions. If these are not prescribed, then there is no right of appeal. There is no authority for applying the rules mutatis mutandis. The Court cannot do it. The Act has delegated to the Rule Committee the right of legislating so far as time, manner, and conditions of the appeal are concerned. Those rules must be treated and construed as part of the Act itself. This Court cannot remedy the omissions of the Rule Committee. The observation of Lord Collins in *In re Coles and Ravenshear* (1) does not apply. Lord Collins never laid it down that the Court had power to mould the rules so as to make them apply to something to which it was not intended that they should apply.

The rules only contemplate the case of an appeal by the subject.

The Act gives a particular limited right of appeal which can only be exercised as prescribed by the rules. No rules appropriate to an appeal by the Commissioners have been made.

(1) [1907] 1 K. B. 1.

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Austen-Cartmell in reply. The appellants are not asking the Court to mould the rules. By s. 7 the Commissioners have a right of appeal as "persons aggrieved." Reading s. 33, sub-s. 4, in that way as including the Commissioners, and reading in the rules, we have everything to make that right absolute which was conditional before. Time and manner are laid down by the rules as they stand. Certain conditions are also laid down applicable to the case of an appeal by the subject. If the Commissioners are appealing, and the rules do not expressly apply to such a case, then the ordinary Rules of Court will apply. The matters referred to are mere matters of machinery introduced by way of convenience. It is not necessary to make any fresh rules in order to give the Commissioners a right of appeal. The rules have satisfied all that is necessary to turn the conditional right into an absolute one.

Cur. adv. vult.

Dec. 16. COZENS-HARDY M.R. By s. 33 of the Finance (1909-1910) Act, 1910, sub-ss. 1, 2, 3, and 5, provision is made for appeals to a referee. It is not necessary to consider those provisions minutely. Sub-s. 4 contemplates that the decision of the referee may not be acquiesced in, and provision is made for an appeal to the High Court. The language of this sub-section is important; it provides that "any person aggrieved by the decision of the referee may appeal against the decision to the High Court within the time and in the manner and on the conditions directed by Rules of Court (including conditions enabling the Court to require the payment of or the giving of security for any duty claimed)."

Now on the construction of this sub-section I think the words "any person aggrieved" are not limited to the subject, but include the Commissioners. Either the subject or the Commissioners may be dissatisfied and feel aggrieved, and to each of them a right of appeal is given. Apparently some doubt was felt on this point, and the Revenue Act, 1911, s. 7, removes all possible doubt: "It is hereby declared that the Commissioners of Inland Revenue, if dissatisfied with the decision of a referee, have under sub-section 4 of section 33 of the principal

Act a right of appeal to the High Court against the decision as persons aggrieved within the meaning of that proviso." It will be observed that this section is declaratory of a right which the Commissioners have, and not an enactment conferring upon the Commissioners a right which they did not previously possess. What, then, is the nature of the right of appeal given by sub-s. 4? Is it an absolute right capable of being exercised although no rules may have been made by the Rule Committee? Or is it a qualified right subject to directions in rules to be made by the Rule Committee? For the purpose of the present appeal I assume, without deciding, that the latter is the better view.

Rules were made by the Rule Committee on January 16, 1911, before the Revenue Act, 1911, came into operation. Those rules direct that any person aggrieved must appeal within one month from the date of the decision (r. 2) and must proceed by petition (r. 1). The rules contain a number of conditions applicable to every appeal, whether by the subject or by the Commissioners, and a number of conditions applicable only to an appeal by a subject. I think it is true that the rule-making authority had primarily in their contemplation an appeal by a subject. But the language used is apt to comply with all the requirements of sub-s. 4. It is not necessary that the rules should lay down all the conditions for every case. The words "if any" must be implied. Where there is a casus omissus, the general provisions of the Rules of the Supreme Court may be appealed to (see r. 13); and where no express provision can be found, it is competent to the judge to give such directions as justice and common sense alike call for.

The point for our decision arises in the following way. The Commissioners have appealed by petition against a decision of a referee. A preliminary objection was taken to the appeal being heard on the ground that there is no machinery by which the Commissioners can appeal to the High Court as the rules do not provide for appeals by the Commissioners. Horridge J. allowed this preliminary objection and dismissed the appeal. With great respect to the learned judge, I think the objection was not valid. For the reasons I have stated, I think the rules do provide for appeals by the Commissioners. The petition was

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properly brought before the Court and must be dealt with on its merits. I do not anticipate any difficulty in dealing with it. The appeal must be allowed, and the petition must be remitted to Horridge J.

FARWELL L.J. The Act of 1910, s. 33, sub-s. 4, gives a right of appeal (which I will assume without deciding to be given) to the subject only; and this appeal is "within the time and in the manner and on the conditions directed by Rules of Court." This Act received the Royal assent in April, 1910, and Rules of Court were made under it in January, 1911. I assume, without deciding, that there could be no appeal until rules had been made. Doubts arose whether the Commissioners of Inland Revenue were entitled to appeal under s. 33, and accordingly the Act of 1911, which received the Royal assent in March, 1911, was passed, and s. 3 enacts as follows: "It is hereby declared that the Commissioners of Inland Revenue, if dissatisfied with the decision of a referee, have under sub-section 4 of section 33 of the principal Act a right of appeal to the High Court against the decision as persons aggrieved within the meaning of that proviso." It is declaratory, and puts the Commissioners in the category of persons aggrieved within s. 33, sub-s. 4, with the right of appeal given to such persons by that section. What then is this right of appeal possessed by persons aggrieved in March, 1911, when the Act passed? The answer is a right to appeal within the time and in the manner and on the conditions directed by the Rules of Court of January, 1911. The fact that these rules do not appear entirely appropriate and cause some difficulties in construction and application is no ground for rejecting them altogether. If the Act of 1911 had stated in terms that the right of appeal declared to be possessed by the Commissioners was subject to the Rules of January, 1911, it would have been impossible to suggest that the difficulties of construction and application enabled us to disregard them and treat them as non-existent; and the same result follows when once it is clear that the Act has that meaning by necessary implication. Obscurity of expression and difficulty of construction are not sufficient grounds for rejecting provisions in Acts of Parliament, although in wills or deeds they might justify a

declaration of voidness for uncertainty; but I do not think that there is any great difficulty in adapting these rules, when read with the other rules and the general practice of the Court, to the case of appeals by the Commissioners.

Suppose that the rules had been made in due time, but had contained no provisions whatever for service on any one, the absence of which in the case of the subject is the point that appears to have most affected Horridge J.'s mind, such omission could not affect the right to appeal: the Court would have had to apply the general practice of the Court.

In my opinion the preliminary objection fails.

HAMILTON L.J. I agree.

The respondent's counsel took the preliminary objection now under discussion in the Court below and have supported it before us on two grounds: first, that the appellants' appeal was incompetent, because the conditions precedent to the right of appeal under the statute had not been satisfied; secondly, that even if the Commissioners' right to appeal existed, their appeal could not be heard unless and until rules had been made by the Rule Committee prescribing a procedure applicable to their case. The first ground went to the learned judge's jurisdiction, the second only to the form in which, if at all, he should entertain the appeal. The first was a question of right; the second, only of procedure.

In fact the procedure had been as follows: the Commissioners of Inland Revenue, as "persons aggrieved by the decision of a referee within the meaning of s. 33 (4.) of the Finance (1909-10) Act, 1910," filed a petition setting forth the matters referred to in r. 1 of the Rules of the Supreme Court (Finance (1909-10) Act), 1911, dated January 16, 1911. The respondent, having been served with it in a manner similar to that prescribed in r. 2, proceeded to serve on the Commissioners a notice of admission of facts, such as is provided for in r. 3, and a further notice, stating the facts and contentions of law on which he intended to rely at the hearing, and requiring the Commissioners to admit facts in manner similar to that prescribed in r. 4 (1.). Thereupon the Commissioners made certain admissions of facts,

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very much as is required by r. 4 (2.). Nevertheless, when the hearing arrived, the respondent successfully contended that the said rules were not appropriate to the appeal in question at all; that no rules existed which prescribed an appropriate procedure; and that in consequence the appeal could not be heard. It does not appear to have been contended on behalf of the Inland Revenue that, by following the procedure indicated under these rules, the respondent had waived any right to contend that no appropriate procedure had been created by rule at all. Horridge J. decided that though a right to appeal existed, and though he had jurisdiction to hear the appeal, he could not do so, because the rules did not provide for appeals by the Commissioners of Inland Revenue. From his dismissal of the appeal the present appeal to this Court has been brought. It was not contended before us that the course taken by Horridge J., though it dealt only with a question of the application of procedure rules, was a mere matter of judicial discretion.

I will take first the construction of s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910. This question is not affected by the Revenue Act, 1911, s. 7, which merely declares, in order to quiet doubts, that under the former section the Commissioners of Inland Revenue have—that is, always had since the former section came into force—a right of appeal as "persons aggrieved" within the meaning of that provision. The question is, what is that right, and to what conditions precedent, if any, is it subject?

If the respondent's contention is right, the Legislature in a taxing Act has declared its opinion that the subject should have a right of appeal to the High Court in his own relief against the impost, and has given its own consent thereto: and yet has deputed to another and an unrepresentative body the function of determining whether, if at all, that right shall ever veritably exist. Till such other body acts, the right is inchoate only. It rests with the rule-making body to say when, if ever, that right shall be enjoyed, and no machinery is provided constraining that body to perform this delegated function. Of course it is competent for the Legislature so to enact, but considering how sedulously the right of the subject against the Crown and of one branch of the Legislature against another has been safeguarded in matters of

taxation, I think that only words clear beyond a doubt can be deemed to express such an intention.

First, the words are not "any person aggrieved . . . . may appeal . . . . so soon as the time, manner, and conditions of such appeal shall have been directed by Rules of Court." The right of appeal is mentioned first; the mode of appeal afterwards. It is one thing to say that when the rules have been issued appellants must conform to them as a condition of the enjoyment of the right of appeal. It is another to say that till the rules have been issued no right of appeal exists at all. The reasoning of Holt C.J. in *Ashby* v. *White* (1), adopted by the House of Lords, in the passage beginning "if the plaintiff has a right he must of necessity have a means to vindicate and maintain it," is strong to shew that as soon as it is clear that the Legislature has given a right of appeal it is available to the subject quocunque modo, unless the rest of the enactment clearly negatives this corollary. Secondly, the conditions to be imposed by rules are not left absolutely to the Rule Committee. One limitation, that contained in the Finance Act, 1894, s. 10, sub-s. 2, is imposed by the enactment: another, namely, that as to security, is expressly named, which would be quite superfluous if all conditions were to be fixed by rules, and that so absolutely that without some rules there would be no appeal. Thirdly, in cases which may go to the county court within the proviso to s. 33, sub-s. 4, the section shall "for the purpose of the appeal apply as if such county court were the High Court, and in every such case any party shall have a right of appeal to the Court of Appeal." It can hardly be possible so to apply this section as that the first right of appeal shall be conditional on the pre-existence of rules, but the second shall be given absolutely and independently of the prescriptions of the rules. Fourthly, the function of the rule-making authority is at least a delegated function, that is, its rules are ultra vires if they go beyond the scope of the delegation. Suppose all the rules, when made, to be ultra vires. If so, they are as if they were not, they do not exist. Yet in what appeal or proceeding is the question of their

(1) 2 Ld. Raym. 938, 953.

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validity to be tried, if there is no right of appeal at all, unless and until rules—that is to say valid rules—have come into being? The rules must be deemed to exist in order to give the appellant the right to be heard, even though he is only heard for the purpose of successfully shewing that they are ultra vires and therefore do not exist at all.

Although this appeal may be disposed of upon the other point, I think that I ought to say that on the construction of the section I personally feel that it would be very difficult to accede to the view put forward by the respondent, and I incline to the opinion that the effect of s. 33, sub-s. 4, is to give "any person aggrieved" a complete right of appeal independently of rules, though when such rules, which are only procedure rules, have been validly made, the appeal must be conducted in conformity with them, just as all legal rights, which are vindicated in Courts of law, must be asserted in conformity with the authorized cursus curiæ. In other words, the Legislature would seem not to have left it to the Rule Committee to say whether there shall be a right of appeal or not, but to have created a right of appeal to which it has attached the minimum of conditions. True it has reserved to the Rule Committee the right to impose conditions of procedure by rules, but till such rules are made so as to condition the right of appeal, it stands as it left the Legislature's hands, and is effective accordingly.

The second point is a simple one. The Rules under s. 33, sub-s. 4, of 10 Edw. 7, c. 8, are dated January 16, 1911. It was after this date that the Revenue Act, 1911, received the Royal assent. Sect. 7 makes no allusion to rules to be made under it; nor does it repeal the words of s. 33, sub-s. 4, with regard to the making of rules. It is fair to suppose that the Legislature deemed the Rules dated January 16, 1911, a performance of the conditions, if any, sufficient to make the right of appeal mentioned in s. 33, sub-s. 4, a complete and effective right.

The words "any person aggrieved" in r. 1 must have the same meaning as they have in s. 33, sub-s. 4, and when the subsequent enactment has declared their meaning, such declaration must equally apply to the rules made under s. 33, sub-s. 4, as to that sub-section itself. It is impossible to construe them

as being exclusive of "Commissioners of Inland Revenue" merely because they are prior in date to the later enactment, or because some of the rules appear not to contemplate the case of an appeal by Commissioners.

It is not necessary here to claim for the High Court any right to "mould" rules made by the Rule Committee, or to apply them otherwise than in accordance with their terms rightly construed. Here are rules duly made under the sub-section, some of which in their entirety and others of which in parts, severable from the remainder of them, are applicable to appeals by Commissioners of Inland Revenue. Rule 2 directs the time, rr. 1, 6, 7, 9, 11, 12, and 13 give directions as to the manner, and rr. 8 and 10 as to the conditions of such appeals. If the sub-section imposes conditions precedent these rules satisfy them. The enactment does not require as a condition precedent the making of "complete" or "exhaustive" or "appropriate" Rules of Court, but of Rules of Court which give directions on certain matters. Of the sufficiency and propriety of such directions the Rule Committee is the judge from time to time.

With all respect to the learned judge I concur in allowing this appeal with some satisfaction, and only regret that he did not make short work of the objection and hear and determine the appeal. Doubtless the objection was one which the respondent was legally entitled to raise, and I am not prone to deprecate the exercise of any legal right, but this objection is without substance. Its decision does not elucidate the law; its success would only postpone a decision on the merits at some considerable outlay of time and money. It appears to have no object except that of endeavouring to score off a Government department. For this a Court of law is to my mind hardly the proper field.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Davenport, Cunliffe & Blake, for J. G. Wilson, Ornsby & Cadle, Durham.*

G. A. S.

[See next Case.]

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Jan. 13, 15.

COMMISSIONERS OF INLAND REVENUE *v.* JOICEY (No. 2).

Revenue—Mineral Rights Duty—Grant of Right to let down Surface—"Lease of right to work the minerals"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 20, *sub-s.* 2.

The respondent being owner in fee of certain copyhold lands, and a colliery company being lessees from the lord of the manor of the coal and other minerals under the said lands, the respondent by deed purported to demise to the colliery company the right to get all the coal and other minerals without leaving any support for the surface in consideration of a rent of a certain sum per ton for all the coal and minerals so gotten after a certain date :—

Held, that the so-called demise was merely a grant of a right to let down the surface in consideration of a money payment, and was not a lease of a right to work the minerals within the meaning of s. 20, sub-s. 2, of the Finance (1909-10) Act, 1910.

Petition of the Commissioners of Inland Revenue on appeal against a decision of a referee under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910.

The respondent, James Joicey, was owner in fee of certain copyhold land in the manor of Lanchester in the county of Durham; and the Ecclesiastical Commissioners as lords of the manor were owners of the minerals under the said land. The respondent had no proprietary right or interest in the minerals. By an indenture of lease dated January 30, 1873, the Ecclesiastical Commissioners granted to the South Moor Colliery Company a lease of the coal, ironstone, and fireclay under certain lands, including the land of the respondent, for a term of forty-two years from October 11, 1884. It appeared from a letter of Mr. R. W. Cooper, a gentleman well acquainted with the manor of Lanchester, that in that manor the lords of the manor and their lessees were entitled to work minerals by underground operations without the consent or authority of the copyholder provided that in so doing they did not let down or otherwise injure the surface, and that in consequence of the copyholder being entitled to support it was not possible to work more than about 50 per cent. of the coal without his licence. It was

alleged by the respondent that for some considerable time previous to September, 1897, much damage had been done to the surface of his land by reason of the colliery company working the pillars of coal that ought to have been kept for support; though this was denied by the petitioners. Under these circumstances it was witnessed by an indenture dated September 1, 1897, and made between the respondent and the colliery company, that the respondent "demises" to the South Moor Colliery Company "full power and liberty from time to time to work get and carry away all the coal ironstone and fireclay or other minerals if any under or adjoining to the said lands of the said James Joicey . . . . without leaving or making any support for the surface of the said lands of the said James Joicey or any buildings for the time being thereon To hold the said liberty unto the colliery company for all the residue unexpired of the said term of forty-two years" granted by the Ecclesiastical Commissioners, "yielding and paying unto the said James Joicey . . . . the clear rent or sum of one penny farthing for every ton of coals ironstone or fireclay which shall from and after the first day of July 1895 have been and shall hereafter be wrought and brought to the surface by the colliery company . . . . from and out of the mines or seams lying under the said lands of the said James Joicey such rent to be payable on the eleventh day of October in each year." The petitioners claimed that the right granted to the colliery company under the said last-mentioned indenture was a "right to work the minerals" within the meaning of s. 20, sub-s. 2, of the Finance (1909-10) Act, 1910. They assessed the rental value of that right at 500*l.* and claimed from the respondent mineral rights duty thereon of 25*l.* The respondent appealed from that assessment, and the referee before whom the appeal was heard decided that the right demised by the indenture of September 1, 1897, was not a "right to work minerals" nor a "mineral wayleave" and therefore was not assessable to mineral rights duty. The petitioners appealed to the High Court.

Sir John Simon, S.-G., and *Finlay*, for the petitioners. Previously to the indenture of 1897 the mineral lessees were not

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in a position to work all the coal, for they were compelled to leave pillars for support. The deed of 1897 gave them a right to work the coal which they could not work under the lease from the lords of the manor. It was a mining lease of so much of the coal. By s. 24 the expression "mining lease" includes a "licence for mining purposes," and the grant by the respondent was clearly such a licence.

Danckwerts, K.C., and *A. T. Bucknill*, for the respondent. The indenture in question was not a lease of a right to work the minerals within the meaning of s. 20. (1) The respondent had no interest in the minerals to demise. He had nothing but a right of support, and that gave him no right or interest in the subjacent strata. In *Backhouse* v. *Bonomi* (2) Lord Cranworth said: "It has been supposed that the right of the party whose land has been interfered with is a right to what is called the pillars or the support. In truth his right is a right to the ordinary enjoyment of his land." The colliery company had already the right to remove all the coal subject to the principle sic utere tuo ut alienum non lædas; and all that the respondent conferred upon them was an easement to injure him by letting down the surface. The compensation for that prospective injury the parties chose to assess at so much per ton of all coal gotten after July, 1895, at which date there was presumably nothing left to get but the pillars. In calling that compensation "rent" they have called it by a wrong name. The Finance Act draws a distinction between a "right to work the minerals" and a "mineral wayleave," a distinction which would be superfluous if the removal of a physical obstruction to the working of the minerals was itself a grant of a right to work them.

(1) By the Finance (1909-10) Act, 1910, s. 20, sub-s. 1, "There shall be charged, levied, and paid . . . . on the rental value of all rights to work minerals and of all mineral wayleaves a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value."

Sub-s. 2: "The rental value shall be taken to be—

"(*a*) Where the right to work the minerals is the subject of a mining lease the amount of rent paid by the working lessee in the last working year in respect of that right."

(2) (1861) 9 H. L. C. 503, at p. 512.

Sir John Simon, S.-G., in reply. Lord Cranworth's proposition applies only to an ordinary surface owner, where the tenure of the surface is freehold. But that is not this case, for the owner of the surface here is a copyholder, and a copyholder stands upon a peculiar footing. In *Eardley* v. *Granville* (1) Jessel M.R. thus states the law on this subject: "The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber trees and minerals. As regards the trees and minerals, the property remains in the lord, but, in the absence of custom, he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut. The possession is in the copyholder; the property is in the lord. If a stranger cuts down the trees the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring his action against the copyholder. . . . . The same rule applies to minerals as to trees." That position is no doubt qualified in the manor of Lanchester by the custom referred to in Mr. Cooper's letter to this extent, that the lords and their lessees may work the coal without being liable to an action at the suit of the copyholder. But that does not diminish the fact of the copyholder's possession of the minerals until they are gotten; and moreover, to the extent to which the minerals cannot be gotten without letting down the surface, the custom does not apply, and consequently the copyholder's possession of them remains to the exclusion of the lord. In respect of those minerals the copyholder has by reason of his possession a valuable interest which is capable of being demised.

Cur. adv. vult.

Jan. 15. HORRIDGE J. The question in this case is whether the amounts payable to the respondent under an indenture dated September 1, 1897, are "rental value of rights to work minerals" within s. 20 of the Finance (1909-10) Act, 1910. At the time

(1) (1876) 3 Ch. D. 826, at p. 832.

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of the indenture the South Moor Colliery Company, Limited, were the lessees of the coal under certain land of which the respondent was copyhold tenant, and by that indenture, after reciting that the respondent claimed that the colliery company were not entitled so to work the coal, ironstone, and fireclay under or adjoining to his said land as to let down or otherwise injure or interfere with the surface or the buildings for the time being thereon erected, it was witnessed that the respondent demised to the colliery company full power and liberty from time to time to work, get, and carry away all the coal, ironstone, fireclay, or other minerals, if any, under or adjoining the said lands of the respondent without leaving or making any support for the surface of the said land, or any buildings for the time being thereon. In consideration of this demise the colliery company agreed to pay to the respondent the clear rent or sum of $1\frac{1}{4}d.$ for every ton of coal, ironstone, or fireclay which should from and after the 1st of July, 1895, have been or should thereafter be wrought and brought to the surface by the colliery company, and they also covenanted by clause 7 to make good or pay for any damage to houses, buildings, or stone walls which might be caused by the colliery company's workings.

The question which I have to consider is whether this payment is really a rent, and whether it is rent paid in respect of the right to work minerals. The Solicitor-General's contention before me was that as the respondent was a copyhold tenant he was entitled to the possession of the minerals, and therefore by the agreement he gave the right to work them. By the letter of Mr. Cooper of July 8, 1912, it appears that any possession of the respondent was liable to be interfered with by the right of the Ecclesiastical Commissioners, as lords of the manor, and their lessees, in this case the colliery company, to get the minerals subject to the right of the respondent to the surface support of his land, and I am of opinion that the so-called rent under this indenture was money payable in respect of the leave by the respondent to let down the surface. I do not think that this is a right to work minerals, although no doubt if it had not been granted the position would have been that the colliery company could not have worked out as much coal as they would

have been able to work under the advantage granted them by the indenture. I dismiss this appeal with costs.

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Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Davenport, Cunliffe & Blake.*

J. F. C.

THE KING *v.* THE LOCAL GOVERNMENT BOARD. *Ex parte* ARLIDGE.

1912
Dec. 17, 18.

Local Government Board—Powers and Duties—Appeal from Local Authority—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 39—*Housing of Working Classes, England, Rules, January* 11, 1910, *rr.* 1, 4, 5, 9.

By s. 17, sub-s. 6, of the Housing, Town Planning, &c., Act, 1909, if, on the application of an owner of a dwelling-house, a local authority, which has made a closing order under sub-s. 2, refuse to determine the order, the owner may appeal to the Local Government Board.

By s. 39 of the Act the procedure on any such appeal shall be such as the Local Government Board may by rules determine, provided that the rules shall provide that the Board shall not dismiss any appeal without having first held a public local inquiry.

By rules made under this section it is provided that every appeal to the Local Government Board shall be made to and brought before the Board by means of a letter or other representation in writing, and that the Board shall not dismiss an appeal without having first held a public local inquiry:—

Held, that the Local Government Board is not bound to hear an appellant or any one on his behalf after receiving the report of their inspector on the inquiry and before dismissing the appeal.

Observations of Madden J. and Wright J. in *Rex* v. *Local Government Board* [1911] 2 I. R. 331, approved and applied.

Held, also, that a properly authenticated order of the Local Government Board made upon an appeal is evidence that the appeal was considered and decided by the Local Government Board or by some person properly appointed to hear it for and on behalf of the Board, until the contrary is proved.

RULE NISI for a certiorari directed to the Local Government Board in the following circumstances.

The mayor, aldermen, and councillors of the metropolitan

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borough of Hampstead, being a local authority within the meaning of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), and the Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), made an order called a closing order, under s. 17, sub-s. 2, of the later Act (1), prohibiting the use for human habitation of a certain dwelling-house, No. 83, Palmerston Road. One William Arlidge was the assignee of a lease of the dwelling-house and the owner thereof within the meaning of the Act. He subsequently applied to the borough council to determine the closing order under s. 17, sub-s. 6, of the same Act. The borough council having refused this application, William Arlidge appealed under the same section to the Local Government Board, who by an order dated February 26, 1912, made under the seal of the Office, signed by the President, and countersigned by a secretary, confirmed the refusal of the borough council to determine the closing order. The rule nisi was obtained on the application of William Arlidge to remove this order into the High Court for the purpose of having it quashed.

The ground on which the rule was moved was that the Local Government Board had not determined the appeal in manner provided by law.

From the affidavit of William Arlidge, the applicant, in support of the rule the following facts appeared:—

On January 12, 1911, the Hampstead Borough Council, under s. 17, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909, made a closing order prohibiting the use of the dwelling-house for human habitation until in their judgment it was rendered fit for that purpose.

On March 7, 1911, the applicant gave notice of appeal against the closing order to the Local Government Board under s. 17, sub-s. 3, of the Act. The Local Government Board replied by letter that they were not prepared to decide this appeal without having first held a public local inquiry.

On May 24, 1911, a public local inquiry into the subject-matter of the appeal was held by an inspector appointed by the Local Government Board. The applicant, having already put

(1) See note on p. 479, post.

the Local Government Board in possession of all the information in his power, did not attend this public inquiry.

On May 23 the applicant through his solicitors wrote to the Local Government Board expressing the hope that after the inquiry was held he would be allowed the opportunity of appearing and stating his case before the authority by whom the matter was to be dealt with. This request was repeated in a letter of June 13, 1911. The Local Government Board acknowledged the receipt of these letters, but did not accede to the request.

On July 29, 1911, the Local Government Board, without giving any information as to the nature or contents of the report of their inspector or allowing the applicant any further opportunity of being heard before the Local Government Board or the authority by whom the appeal was to be actually decided, made an order confirming the closing order and ordering the applicant to pay costs. An application was then made to the Local Government Board to state a special case under s. 39, sub-s. 1 (*a*), of the Act of 1909, but the Board refused to do this.

On July 10, 1911, the applicant had applied to the Hampstead Borough Council to determine the closing order under s. 17, sub-s. 6, of the Act of 1909. In answer to this application, after certain immaterial correspondence had passed, a notice dated November 2, 1911, was served upon the applicant to the effect that the borough council refused to determine the closing order. On November 15 the applicant gave notice of appeal against this refusal.

On November 25 the applicant received notice from the Local Government Board to the effect that the Board proposed to direct a public local inquiry into the matter of this appeal and that notice of the date of the inquiry would be given to him; the notice further drew attention to the Rules as to appeals to the Board under Part I. of the Act of 1909 and requested the applicant to furnish the Board with the original documents of refusal to determine the closing order. The applicant replied protesting against the inquiry, which was, nevertheless, held on December 8, the applicant being represented thereat by his solicitor. No information was given as to the nature or contents

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of the report of the inspector before whom this second inquiry was held, and the applicant was not allowed an opportunity of being heard before the Local Government Board or the authority by whom the appeal was actually to be decided. On February 26, 1912, the Local Government Board made the order signed and sealed as above mentioned confirming the refusal of the borough council to determine the closing order and ordering the applicant to pay costs.

The applicant further stated in his affidavit that it was the practice of the Local Government Board to consider as confidential the reports made in such cases by their inspectors after the holding of a public local inquiry and to refuse to disclose to the appellant the nature and contents thereof.

A rule nisi having been granted, the following evidence was filed on behalf of the Local Government Board :—

An affidavit of Edward Leonard, the Local Government Board inspector, who held the inquiries on May 24 and December 8, 1911, respectively, stated that before the first inquiry was held notice thereof was given to the applicant's solicitors and public notice thereof duly posted stating that the inspector would be prepared to receive the evidence of any persons interested in the matter of the appeal. The applicant's solicitor was present during part of the inquiry, but took no part in the proceedings. The inspector stated publicly that after hearing witnesses for the applicant and the borough council he would be prepared to hear the evidence of any persons who could satisfy him that they were interested in the appeal. He called upon the appellant to state the grounds of his appeal. There was no answer, but the town clerk of Hampstead stated that he had received a letter from the applicant's solicitors to the effect that the applicant did not intend to take any part in the proceedings. After hearing all the witnesses who desired to give evidence the inspector stated publicly that he proposed to inspect the premises forthwith and invited both parties to the appeal to accompany him. Being unable to get access to the premises on May 24, the inspector on May 31 served notices on the applicant and on the occupier of the premises that he intended to enter them on June 2 for the purpose of survey and examination. On that date he inspected

the premises in the presence of the applicant and others. On May 27 the inspector made his report and submitted the evidence and report to the Local Government Board. On June 5 he submitted his report on his inspection of the premises.

Before the second inquiry notices were served and posted as on the first inquiry. The applicant was present with his solicitor and witnesses. The inspector heard all the witnesses called for the applicant, including the applicant himself. After hearing all the witnesses and the arguments on behalf of the applicant by his solicitor, the inspector went to the premises accompanied by the applicant and others and carefully inspected the premises. He stated that he carefully considered the evidence as to the condition of the premises with the facts observed by him at the inspection, and, as a result of such consideration, on December 13, 1911, he made a full report to the Local Government Board, submitting with it a transcript of the shorthand note taken by agreement of the evidence given at the inquiry.

An affidavit of Sir Horace Cecil Monro, K.C.B., Permanent Secretary to the Local Government Board, stated that the order of the Local Government Board dated July 29, 1911, was made after full consideration of the evidence given at the inquiry held on May 24 and the report of the inspector and of all documents submitted to them by or on behalf of the applicant.

It further stated that the order of February 26, 1912, confirming the refusal of the borough council to determine the closing order, was made after a full, careful, and impartial consideration of the facts and of the reports of the inspector and of the evidence and documents which accompanied those reports; that a large number of observations and objections put forward on the applicant's behalf by his solicitor were also considered, and before a final decision was come to the applicant was invited by letter dated January 8, 1912, to place before the Board for their consideration any further statement which he might desire them to consider with reference to the subject-matter of his appeal before the making of the order. It finally stated that the appeal had been determined judicially upon the report of the inspector and the evidence taken by him, although without any further hearing of the applicant beyond that at the inquiry, in

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the same manner in all respects as other appeals to the Board have been accustomed to be determined under the various statutes prior to the Housing, Town Planning, &c., Act, 1909, which have given appeals to the Board; and submitted that no other form of procedure than that adopted by the Board in this case was intended or required by that Act.

Upon this evidence cause was shewn by *Sir J. Simon, S.-G.*, and *Branson*, for the Local Government Board, and

S. G. Turner, for the Hampstead Borough Council. The Housing, Town Planning, &c., Act, 1909, is a statute amending the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), which is therein called the principal Act. Sects. 32 and 33 of the principal Act are repealed and replaced by ss. 17 and 18 of the Act of 1909. By s. 35 of the principal Act any person aggrieved by an order of the local authority might appeal to a Court of quarter sessions; but by s. 17, sub-s. 3, of the Act of 1909 an appeal from a closing order, and by s. 17, sub-s. 6, an appeal from the refusal of a local authority to determine a closing order, lies to the Local Government Board.

There is no ground for suggesting that this appeal has not been heard according to law. The Local Government Board is not a Court of justice; it is an administrative department, or, in the words of Wright J. in *Rex* v. *Local Government Board* (1), "a great central controlling body." To apply to them the same tests and same considerations as would be properly applied to an ordinary judicial tribunal is to mistake their true position and functions. (2)

The words used by Lord Loreburn L.C. with reference to the Board of Education in *Board of Education* v. *Rice* (3), are very appropriate. If a question comes before them for decision they are not "bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or

(1) [1911] 2 I. R. 331. (2) [1911] 2 I. R. at p. 347.
(3) [1911] A. C. 179.

contradicting any relevant statement prejudicial to their view." (1) The method by which the Local Government Board usually obtain information is by inquiry before one of their inspectors. The medium through which the Board is approached is writing and not word of mouth. A statute giving an appeal to the Local Government Board would, if it said no more, impliedly authorize the Board to inform themselves by means of a public inquiry and to require that the appeal should be presented in writing. The statute in this case goes further; by s. 39 it expressly enjoins an inquiry before an appeal is dismissed, and the rules made under that section, which have the authority of statute, direct that the appeal shall be presented in writing. The inquiry was held, and the applicant was heard. Every opportunity was given to him, and accepted by him, for presenting his appeal in writing. The applicant complains that he has not been heard by himself or by some advocate on his behalf between the date of the inquiry and the date of the decision. The answer is that he has no right to be so heard. His right is to be heard fairly in the way prescribed by statute, and he has been so heard.

The applicant next complains that the contents of the inspector's report were not made known to him; but he shews no right to have any such information. It has never been the practice of the Local Government Board to communicate to members of the public the reports of their inspectors, and this was well known to the Legislature when it enjoined a public local inquiry before dismissing an appeal.

Thirdly, the applicant contends that the proceedings on this appeal are null and void because it nowhere appears that the person who gave the decision was the person who considered the facts and arguments. But in the face of a formal document sealed with the seal of the Board, signed by the President, and countersigned by a secretary it must be assumed, until the contrary is proved, that the proceedings were regular. Work of this kind may be delegated to some person to be done for and on behalf of the department: *Parsons* v. *Lakenheath School Board* (2); and it must be taken that the proper officer, or some

(1) [1911] A. C. at p. 182. (2) (1889) 58 L. J. (Q.B.) 371.

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one duly deputed to hear and determine this appeal on behalf of the Local Government Board, heard and determined it regularly and in order.

Macmorran, K.C., and *J. Brooke Little*, in support of the rule. The appeal to the Local Government Board is essentially a judicial proceeding. The effect of a closing order may be to deprive the owner of his property altogether; it may be followed by an order for demolition, and the house may be pulled down. Further, by s. 39 the Board have power to award costs. Therefore the inquiry is a judicial inquiry. Under s. 35 of the Housing of the Working Classes Act, 1890, the appeal lay to a Court of quarter sessions where the appellant would have been heard in due form of law. The Local Government Board must now proceed in the same way. They must give to the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view: per Lord Loreburn L.C. in *Board of Education* v. *Rice.*(1) A fair opportunity is not given where the appellant has no means of knowing what is in the mind of the tribunal which purports to adjudicate. By s. 39 the Board are to state in the form of a special case any question of law arising in the course of the appeal. This provision is nugatory if the appellant has no means of knowing how the Board is going to decide. By r. 5 the Board may apply to one party for further information and the additional information may be supplied by that party behind the back of the other party, if he is not entitled to be heard. It follows that the appellant must have a right to be heard after the public inquiry and before the decision on the appeal.

Secondly, this appeal has not been heard by the Local Government Board at all. The Local Government Board is constituted by the Local Government Board Act, 1871 (34 & 35 Vict. c. 70). It consists of certain great officers of State mentioned in that statute. Any act to be done or instrument to be executed may be done or executed in the name of the Board by the President or any member of the Board, or by a secretary or assistant secretary if authorized by a general order of the Board. It is not to be supposed that the President or any member of

(1) [1911] A. C. 179, at p. 182.

the Board has heard or dismissed this appeal in person; and no general order of the Board authorizing any secretary or assistant secretary to hear or decide it has been produced or mentioned. There is nothing to shew that the person (if any) who considered the appellant's case and the report of the inspector was the person who decided the appeal. The document under the seal of the Board and signature of the President is good evidence that an order has been made, but it is no evidence that any member of the Board has heard and decided the appeal.

RIDLEY J. This is a matter of considerable importance. The Local Government Board shew cause against a rule nisi for a certiorari obtained against them on the ground that they have not determined in manner provided by law an appeal from the refusal of the Hampstead Borough Council to determine, i.e., to cancel, a closing order made by the council under s. 17, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909. The applicant first appealed from the closing order. That appeal was dismissed, a public local inquiry having been first held as directed by s. 39 of the Act and r. 9 made thereunder. He also applied under s. 17, sub-s. 6, to have the closing order determined. The local authority refused to determine the closing order. From this refusal of the local authority the applicant then appealed to the Local Government Board under s. 17, sub-s. 6. This appeal was also dismissed, a second public local inquiry having been held before this was done. The question before us arises upon the order dismissing this appeal. On the hearing of each appeal the procedure was followed which has been prescribed by rules made under s. 39. These rules contain no provision for the personal attendance of the appellant at the hearing of the appeal, or for his being heard in person or by any one on his behalf; the report made by the Local Government Board's inspector on a public local inquiry need not be communicated to the appellant, and the reasons for the decision of the Board need not be made known. The rules provide that every appeal shall be made to and brought before the Board by means of a letter sent to the office of the Board setting forth in detail the grounds of appeal and all material facts affecting the appellant. The

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letter is to be accompanied by any notices, orders, or demands relating to the grounds or subject-matter of the appeal. The Local Government Board may require any further information to be furnished which the appeal seems to require for its due consideration. Furthermore, by s. 39 of the Act the Local Government Board may at any stage of the proceedings on appeal, and shall if so directed by the High Court, state a special case for the opinion of the Court on any question of law arising in the course of the appeal; and by that section and the rules the Board cannot dismiss an appeal without having first held a public inquiry. Those are the means taken for bringing before the Local Government Board upon an appeal the facts and the legal contentions relied upon by an appellant.

The appeal in question from the refusal of the local authority to determine the closing order was heard in accordance with these rules. A report was made and forwarded to the Local Government Board, but its contents were not disclosed to the applicant. After desiring the applicant to make known anything further that he might wish to urge in his own behalf, the Local Government Board on February 26, 1912, dismissed his appeal with costs.

Mr. Macmorran contends that the appeal is a judicial proceeding replacing the appeal to quarter sessions and partaking of its nature; that consequently the appellant has a right to be heard and a right to be informed of the grounds of the decision; and that, as neither of these rights has been accorded to him, his appeal has not been heard and decided according to law. I have much sympathy with this contention from the point of view of the suitor; but this does not warrant us in giving the Act any other than its natural meaning. We have to construe, not to enact, a statute. There are other instances in which judicial or quasi-judicial functions are assigned to administrative offices acting under statutes and rules analogous to those in the present case. The Education Acts furnish an example. We can derive assistance from those cases, although they are not on all fours with the present. In this view the judgment of Lord Loreburn L.C. in *Board of Education* v. *Rice* (1) is in point. The Lord Chancellor

(1) [1911] A. C. 179.

there said (1): "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." The judgments of Lord O'Brien L.C.J. and Madden J. in *Rex* v. *Local Government Board* (2) are to the same effect. It is contended in the present case that the applicant's appeal was not heard by the Local Government Board at all; that it could only be heard by a member of the Board, or by a secretary or assistant secretary by a general order of the Local Government Board (under s. 5 of the Local Government Board Act, 1871,) authorized to hear the appeal, and that no general order authorizing a secretary or assistant secretary in that behalf has been made. But on the evidence before us we must assume that some person having the authority of the Board has dealt with this appeal, and that this official, whoever he may be, has read the evidence placed before him and has determined the appeal. We must assume that this was done regularly. We must take it that reasons for the decision were found and considered although they are not given. There is no suggestion that any want of fairness or of equity characterized the hearing, which consisted of the consideration of facts and arguments, not indeed stated orally, but committed to paper. This is one of

(1) [1911] A. C. at p. 182. (2) [1911] 2 I. R. 331.

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those cases in which judges are asked to make a different statute from that which the Legislature has passed, and to which the words of Parke B. advising the House of Lords in *Egerton* v. *Earl Brownlow* (1) are as applicable now as when they were spoken in the year 1853: "It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good . . . . They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise." Guided by these principles and for the reasons above stated I have come to the conclusion that this rule should be discharged.

LORD COLERIDGE J. This matter arises upon an order of the Local Government Board dismissing an appeal to the Board from a refusal of the Hampstead Borough Council to determine a closing order. Before the Local Government Board could dismiss that appeal they were bound under s. 39 of the Housing, Town Planning, &c., Act, 1909, to hold a public local inquiry. That inquiry was duly held. The applicant attended it with his solicitor and witnesses. His evidence was received and sent with a report made by a properly appointed inspector to the Local Government Board. The applicant was invited by a letter of January 8, 1912, to submit in writing to the Local Government Board anything that he might desire to add. His solicitors replied to that letter on his behalf and took such points as they thought necessary. In the result on February 26 the Local

(1) (1853) 4 H. L. C. 1, at p. 123.

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Government Board made the order in question confirming the refusal of the Hampstead Borough Council to determine the closing order.

Two points are urged. First, that the procedure before the Local Government Board was informal and irregular because the evidence had not been perused by any person properly appointed to act for the Board. To make this point good the applicant had to prove it, because we have before us a public document signed by the President of the Local Government Board vouching that the Board have, after holding a public local inquiry, confirmed the refusal of the local authority to determine the closing order. It must be presumed that this was done, if not by the President himself, by some properly appointed person, until the contrary is shewn. As the contrary has not been shewn we have no alternative; we must hold that the procedure was regular.

The second point is that the applicant ought to have been heard in person by the official who ultimately decided the appeal. In hearing appeals the Local Government Board act according to rules. The rules have not been impugned; it is not suggested that they are ultra vires, or that they are inapplicable. They provide for evidence being submitted in writing. It is open to the Board to receive evidence in writing. They were given a discretion as to how they would receive evidence, and they have chosen written evidence. They were justified in so choosing. It is said that, because they have power to award costs, the proceeding must be a judicial inquiry in due form of law which necessitates another meeting and fresh evidence before final determination. If there were any reason for saying that the process was contrary to natural justice, that might be an objection of some force; but to speak of these proceedings as a trial with all proper legal formalities is to misconceive the functions of an administrative department like the Local Government Board. I adopt the words of Wright J. in *Rex* v. *Local Government Board* (1) as peculiarly applicable on this point. "The Local Government Board," said the learned judge, "in making these orders may be, and I assume are, making

(1) [1911] 2 I. R. 331, at p. 347.

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a judicial determination; but the Board is not a Court, with a Court list, and public sittings, publicly notified. They are a great central controlling body, and to apply to them the same tests and same considerations as would be properly applied to an ordinary judicial tribunal, seems to me completely to mistake their true position and functions." Adopting that language, I think on both points that the rule must be discharged.

BANKES J. This is an attempt to challenge the procedure adopted by the Local Government Board for hearing appeals under the Act of 1909. A rule has been obtained for a certiorari calling upon the Local Government Board to shew cause why the order of February 26, 1912, dismissing the appeal of the applicant to the Board should not be quashed on the ground that the Board had not determined the appeal in manner provided by law.

Two grounds are taken: first, that the applicant has been given by s. 17, sub-s. 6, of the Act of 1909 a right of appeal to the Local Government Board, but that his appeal has not in fact been determined by the Local Government Board; secondly, that even if he is wrong on his first ground, the procedure adopted by the Local Government Board in deciding the appeal is contrary to natural justice, because the appellant was not given an opportunity of being heard. In my opinion both grounds fail. The applicant elaborates his argument thus: it is said that the Local Government Board was created by an Act of 1871 which provides that the Board shall consist of certain great officers of State mentioned in the Act. Any act to be done or instrument to be executed may be done or executed in the name of the Board by the President or any member of the Board, or by a secretary or assistant secretary if authorized by a general order of the Board. It is said that no such general order has been made; that therefore no secretary or assistant secretary has any authority to determine this appeal; and consequently that the only person having statutory authority is some member of the Local Government Board; and though it is true that the order which is challenged bears the signature of the President of the Local

Government Board, yet that it is improbable that the President himself can have dealt with the appeal, and therefore that the appeal has never in fact been decided by the Board.

I am not prepared to assent to the suggestion that this appeal has not been heard by the President personally; but, be that as it may, when a statute gives an appeal to an administrative body like the Local Government Board, it contemplates that this particular class of business may be delegated by the Board to some person; and provided that the order ultimately made is properly authenticated in the name of the President, so that he takes upon himself the personal responsibility, and so that thereby the public is secured in having some proper person to dispose of the appeal, the order is a good order, and the appeal is properly heard. In confirmation of this view the case of *Parsons* v. *Lakenheath School Board* (1) clearly indicates that it is competent for the President or other proper officer to delegate such work as this to some person to be done for and on behalf of the Board. So there being an order properly authenticated by the seal of the Office and the signature of the President, and countersigned by a secretary, that is the act of the Local Government Board, and it is quite immaterial who the person was who in fact had cognizance of this matter delegated to him. Therefore this order must be taken to be the act of the Board, and it is not sufficient to suggest that some person other than the President saw the documents.

Secondly, as to whether or not the procedure was contrary to natural justice, it is important to consider that s. 39 of the Act of 1909 provides that the procedure on any appeal shall be such as the Board may by rules determine. That gives the Board the right to say whether the procedure shall be by way of written case or by a hearing like that before a Court of justice, where a party makes appearance in person or by counsel and may call evidence. The statute goes on to provide (*a*) that the Local Government Board may at any stage of the proceedings, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal; and (*b*) that the rules shall

(1) 58 L. J. (Q.B.) 371.

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provide that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry. These two provisoes were inserted to secure a certain measure of protection against the possible unfairness of a procedure which would eliminate a personal hearing. Therefore if any question of law is raised, the appellant has the right to have it decided by the High Court, and before there is a decision against an appellant there must be a public local inquiry, a well-known means whereby the Local Government Board inform themselves, which the appellant is entitled to attend and where he can put his case and bring such evidence as he desires. The rules made under this section exclude the idea of a hearing such as is had before a Court of justice where the party is heard in person or by counsel or other advocate; they provide for a statement in writing, and if anything further is wanted, it is to be furnished in such form as the Local Government Board specify. The Board have the option of saying whether it shall be furnished by parol or in writing; but the appellant has no right to attend personally or by advocate. The appellant is heard by means of a written statement and of attendance before the inspector at the public local inquiry. These means are considered sufficient to enable him to present his case and be heard before the Local Government Board proceed to dismiss his appeal. In the present case the Board, before adjudicating, sent the applicant a letter asking him whether he wished to make any further statement, and he could then have submitted anything he had to say. Is there anything contrary to natural justice in refusing an appellant any opportunity of being heard other than that indicated by the statute? In my view the applicant in this case has been given the fullest opportunity of being heard.

Mr. Macmorran claims that *Board of Education* v. *Rice* (1) is in his favour. In my view the facts in that case were more favourable to Mr. Macmorran's contention than are those in the present case; yet the decision was against that contention. In that case there were no rules prescribing the procedure to be adopted by the Board, and therefore it was easier there to

(1) [1911] A. C. 179.

argue that the procedure was contrary to natural justice, but the decision of the House of Lords gives no support to that contention.

In the case of *Rex* v. *Local Government Board* (1) Madden J. said, in language which I adopt, "An appeal under the Act"—i.e., the Old Age Pensions Act, 1908—"is not to be treated as merely a lis inter partes, but as the subject-matter of inquiry of a judicial character which, as it affects the interests of the applicant, ought to be conducted in accordance with the principles of natural justice." Further on in his judgment (2) the learned judge said: "The Local Government Board is one of several great administrative bodies who find themselves, in the course of administration, performing duties which this Court regards as judicial . . . . It is impossible to lay down any hard and fast rule as to the requirements of natural justice in such a case. It was never contemplated, and it would be unreasonable to hold, that a formulated procedure, such as that which has come into use in Courts of justice, should be adopted. But the claimant should be given an opportunity of presenting his case to the Board in some way suitable to the character of the inquiry, and it would probably be in writing." Some persons may think that the procedure adopted is very undesirable and that it would be far better if these appeals were heard, as they formerly were, before a judicial tribunal. With such opinions we are not concerned, although it would perhaps add to the public confidence in these inquiries if the reports of inspectors were not always treated as confidential documents. I agree that the rule must be discharged.

Rule discharged.

Solicitors for the applicant: *Rubinstein, Nash & Co.*
Solicitors for the Local Government Board: *Sharpe, Parker & Co.*
Solicitor for the Hampstead Borough Council: *A. P. Johnson.*

NOTE.—Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), s. 17, sub-s. 2: "If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state," (i.e., in a state so dangerous or

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(1) [1911] 2 I. R. 331, at p. 343. (2) [1911] 2 I. R. at p. 344.

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injurious to health as to be unfit for human habitation) "it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

Sub-s. 3: "Notice of a closing order shall be forthwith served on every owner of the dwelling-house in respect of which it is made, and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the order is served upon him."

. . . . . .

Sub-s. 6: "The local authority shall determine any closing order made by them if they are satisfied that the dwelling-house, in respect of which the order has been made, has been rendered fit for human habitation.

"If, on the application of any owner of a dwelling-house, the local authority refuse to determine a closing order, the owner may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the application is refused."

Sect. 39, sub.-s. 1: "The procedure on any appeal under this Part of this Act, including costs, to the Local Government Board shall be such as the Board may by rules determine, and on any such appeal the Board may make such order in the matter as they think equitable, and any order so made shall be binding and conclusive on all parties, and, where the appeal is against any notice, order, or apportionment given or made by the local authority, the notice, order, or apportionment may be confirmed, varied, or quashed, as the Board think just.

"Provided that—

"(*a*) the Local Government Board may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal; and

"(*b*) the rules shall provide that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry"

Under this section there have been made among others the following

RULES DATED JANUARY 11, 1910, WITH REFERENCE TO APPEALS.

Rule 1: "Every appeal to the Local Government Board shall be made to and brought before the Local Government Board by means of a letter, or other representation in writing (hereinafter referred to as a 'statement of appeal') which shall be addressed and posted, or shall be otherwise given, sent, or delivered to the Local Government Board at their office, and of which a copy shall, at the same time, be addressed and posted, or shall be otherwise given, sent, or delivered to the local authority at their office."

Rule 4: "Every statement of appeal shall be accompanied by every such document as an appellant has in his possession or at his disposal, and is able to furnish, and as consists of, or comprises, or gives particulars of, any notice, order, demand, or apportionment relating to the grounds or subject-matter of the appeal, or otherwise relating to any material facts set forth in the appeal; and shall show by appropriate particulars in the statement of appeal, or by an appropriate entry on any such document accompanying the

statement of appeal, the date of service upon an appellant of the notice, order, demand, or apportionment."

Rule 5: "Where an appeal appears to the Local Government Board to require, for its due consideration, that information, other than such information as is set forth in the statement of appeal, or is supplied by means of any document accompanying the statement of appeal, or by means of any statement by or correspondence with an appellant or the local authority respecting the appeal, shall be furnished to the Local Government Board, the requisite information shall, on the written request of the Local Government Board, be furnished by an appellant or by the local authority, as the case may be, in such manner, in such form, and within such time as the Local Government Board in writing specify."

Rule 9: "The Local Government Board shall not dismiss an appeal without having first held a public local inquiry.

"Where the Local Government Board are required to hold a public local inquiry, and written notice of the time and place at which the inquiry will be held has been given by the Local Government Board to every appellant and to the local authority, a printed copy of the notice shall be posted by the local authority at every place specified in writing by the Local Government Board as necessary or suitable for the purpose."

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REX v. LOCAL GOVERNMENT BOARD ARLIDGE, *Ex parte.*

[IN THE COURT OF APPEAL.]

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Nov. 27, 28, 29; *Dec.* 12.

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Highway—Way becoming a Highway after 1835*—Absence of Intentional Dedication by Owner—Non-compliance with Conditions of s.* 23 *of the Highway Act,* 1835 (5 & 6 *Will.* 4, *c.* 50)*—Whether Way repairable by Inhabitants at large.*

The provisions of s. 23 of the Highway Act, 1835, with respect to the repair of new highways are not confined in their application to highways which have become such as the result of intentional dedication by the owner of the soil.

At some date subsequent to 1835 a way, which had previously been set out in an inclosure award as a private bridle-path, became a public highway, but there was no evidence to shew at what precise date, or how, or under what circumstances it became such. In the absence of evidence that the conditions of s. 23 of the Highway Act, 1835, had been satisfied:—

Held, that the way was not repairable by the inhabitants at large.

Decision of the Divisional Court [1912] 2 K. B. 432, affirmed.

APPEAL from the decision of a Divisional Court (1) upon a case stated by quarter sessions on appeal from an order of justices,

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approving a provisional apportionment of expenses of making up a road under the Private Street Works Act, 1892.

The case is set out in the report in the Court below. Shortly stated, the facts were as follows :—

The respondents, the council for the urban district of Walton-upon-Thames, on October 5, 1910, ordered that the road in question, known as Cottimore Lane, should be made up under the Private Street Works Act, 1892, and that the specification, estimates, and provisional apportionment prepared by the surveyor should be approved.

The appellant was treated as liable to be charged in the apportionment a certain sum. The appellant objected (1.) that Cottimore Lane was not a street within the meaning of the Act, and (2.) that it was a highway repairable by the inhabitants at large.

At the quarter sessions it was established (inter alia) that the appellant was a frontager on the lane. It was admitted by the respondents that the lane was now and had been since the year 1864 a highway used both by foot passengers and vehicles, but there was no evidence to shew how, when, or under what circumstances and at whose expense the lane was originally made or laid down. The site of the road and adjoining lands were formerly common lands which were enclosed under the Walton Inclosure Act, 1800 (39 & 40 Geo. 3, c. lxxxvi.). The Act provided for the setting out by the Inclosure Commissioners of public and private roads and ways and enacted that after such setting out it should not be lawful for any person to use any of the ways, public or private, over any of the lands by the award intended to be enclosed, but that all roads and ways over any such lands which should not be set out as aforesaid should be for ever stopped up and extinguished. The justices found that the road in question was not set out as a highway, and if ever it had been a highway it had been stopped up and extinguished by virtue of the Act and award.

By an award made under the said Inclosure Act the portion of Cottimore Lane in question was allotted to one Peppin together with an allotment of waste land subject to a bridleway and footpath to and for the use of the occupiers for ever of a certain

farm. The site of this bridleway and footpath was what was now known as Cottimore Lane.

In or about the year 1864 the land over which the bridleway and footpath ran together with other lands became the property of one Alderman Sidney, who developed a portion thereof as a building estate and opened up new roads joining the private road in question with a public highway. No public money had ever been expended in the making or repairing of the said road, and there was no evidence that it was ever repaired by the inhabitants at large or by the respondents or their predecessors.

The justices found upon the evidence before them that the road was not a public highway in 1835, and that although now a public highway it was not repairable by the inhabitants at large.

The questions for the opinion of the Divisional Court were:—

1. Whether on the facts as stated in the case the respondents were entitled to rely upon s. 23 of the Highway Act, 1835. (1)

2. Whether the justices were right upon the evidence in finding that the road or lane was not a highway repairable by the inhabitants at large.

The Divisional Court affirmed the decision of the justices. They held that s. 23 applied to the case of a way becoming a highway by public user, and that if on the facts there was no evidence of any person having complied with the formalities of the section, there was no presumption that the road, if it became a highway after 1835, was repairable by the inhabitants at large; and further that the justices were right in coming to the conclusion that the lane was not a highway in 1835, and that although

(1) By s. 23 of the Highway Act, 1835, "No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an Inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public," shall give three months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made up the road to the satisfaction of the surveyor and of two justices, and obtained a certificate of the justices to that effect, and performed the other conditions of the section.

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it was a highway at the present time it was not repairable by the inhabitants at large.

Against this decision the appellant appealed.

Danckwerts, *K.C.*, and *Cababé*, for the appellant. In this case the quarter sessions have affirmed the order of the justices which makes the appellant liable as a frontager to contribute to the making up of the road, subject to a special case. According to the old law the Court of Appeal could only quash or affirm an order of quarter sessions, they could not vary it. Then a practice of stating special cases grew up, as explained by Lord Cairns in his judgment in *Overseers of the Poor of Walsall* v. *London and North Western Ry. Co.* (1), but at that time there was still a doubt whether the jurisdiction of the Court of Queen's Bench in a special case was merely consultative, or judicial and therefore open to an appeal to this Court. That doubt was set at rest by the Supreme Court of Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 2, sub-s. 1, which enacts that every special case stated by quarter sessions shall be treated as an appeal.

The first question which arises is whether under the circumstances s. 23 of the Highway Act applies. In this case the road was undoubtedly a highway before the Inclosure Act of 1800. It was extinguished by s. 22 of that Act because it was not set out as a highway under the award made in 1804. But though extinguished as a highway it was not physically closed and was used to a certain extent. There is sufficient evidence of user since 1835 to prove that it is a highway now, but it is said that it is not repairable by the inhabitants because the formalities of s. 23 of the Highway Act, 1835, have not been complied with. But that section only applies when some one dedicates a highway. It was passed to prevent persons who were laying out building estates from throwing on the public the expense of making the roads by merely dedicating them. It has no application to a highway acquired by user. There are two ways in which a road can become a public highway, namely, by express dedication manifested by an overt act or by tacit consent and user by the public. Where the latter is the case, as it is here, and

(1) (1878) 4 App. Cas. 30, 40.

there never was a person proposing to dedicate within the meaning of s. 23, that section does not apply: *Reg.* v. *Thomas* (1); *Healey* v. *Batley Corporation* (2); *Attorney-General* v. *Watford Rural Council.* (3) *Leigh Urban Council* v. *King* (4) also supports the same principle and shews that even if s. 23 is to be taken to apply where there has been no intentional dedication, after a lapse of fifty years, when the witnesses who could prove the facts are probably dead, it must be presumed that the formalities of the section were duly complied with. That presumption may be rebutted, but the fact that the inhabitants have never repaired the road and that the adjoining owners have done so is not sufficient to rebut it and is not inconsistent with its being a public highway: *Reg.* v. *Newbold* (5); *Rex* v. *Inhabitants of Leake* (6); *Attorney-General* v. *Watford Rural Council.* (3) Too much importance was attached to the question of repairing in the Court below. The burden of shewing that the highway is not repairable by the inhabitants at large is on the local authority: *Rishton* v. *Haslingden Corporation* (7); *Vyner* v. *Wirral.* (8)

It is submitted, therefore, that s. 23 does not apply. But if that view is wrong, then it is submitted further that the justices went contrary to the facts in refusing to draw the inference that it was a highway repairable by the inhabitants at large. The truth of the matter seems to be that this was an ancient highway before the award which was supposed to extinguish the highway. It is clear that it existed as a highway before the Highway Act, 1835. At each end of the epochs in question and according to the maps the road existed in fact, no one knows how, and it continued to exist, and there was a dedication by implication of law, and the road was repairable by the inhabitants.

Sir F. Low, K.C., and *W. Mackenzie*, for the respondents. The first question is whether the inference drawn by the justices was such as this Court will interfere with.

(1) (1857) 7 E. & B. 399.
(2) (1875) L. R. 19 Eq. 375.
(3) [1912] 1 Ch. 417.
(4) [1901] 1 K. B. 747.
(5) (1869) 17 W. R. 295.
(6) (1833) 5 B. & Ad. 469, 482.
(7) [1898] 1 Q. B. 294.
(8) (1909) 7 L. G. R. 628; 73 J. P. 242.

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[COZENS-HARDY M.R. We will not trouble you on that part of the case.]

Then on the question of s. 23, it is clear on the facts that this was not a highway before 1835. Repairs have been done on it, not by the public, but by contiguous owners, and the public user raises the presumption of dedication by some one. There is no onus on the respondents to shew dedication. This is just such a case as s. 23 was intended to meet: per Wills J. in *Eyre* v. *New Forest Highway Board*. (1)

This case comes under the second branch of s. 23. The bridle-path laid out by the commissioners had become in 1864 a private road, and after 1864 it was a public highway, and if it is necessary to find any one who dedicated it, the clear inference is that it was Alderman Sidney who did so.

In *Reg.* v. *Thomas* (2) the road was made under statutory authority, and so it was not possible to say that it came within s. 23. The dicta of Bacon V.-C. in *Healey* v. *Batley Corporation* (3) are not consistent with the observations of Wills J. in *Eyre* v. *New Forest Highway Board*. (1) In *Attorney-General* v. *Watford Rural Council* (4) the onus of proof was dealt with, and there was evidence in that case that the road was a highway before 1835; but there is no such evidence here.

It is not necessary to shew that the road was actually made by and at the expense of any one. It is sufficient, if it comes into existence as a highway after 1835, for s. 23 to apply, and then, unless the necessary formalities are complied with, the inhabitants are not compellable to repair the road: *Fenwick* v. *Rural Sanitary Authority of Croydon Union* (5); *Roberts* v. *Hunt* (6); *Reg.* v. *Inhabitants of East Hagbourne* (7); *Reg.* v. *Inhabitants of Dukinfield* (8); *Attorney-General* v. *The Conduit Colliery Co.* (9); *Beeston Urban Authority* v. *Cotton*. (10) It is clear on the authorities that when a highway comes into existence after 1835, unless the conditions of s. 23 have been satisfied, there is no obligation on the inhabitants to repair.

(1) (1892) 56 J. P. 517.
(2) 7 E. & B. 399.
(3) L. R. 19 Eq. 375.
(4) [1912] 1 Ch. 417.
(5) [1891] 2 Q. B. 216, 223.
(6) (1850) 15 Q. B. 17.
(7) (1859) 28 L. J. (M.C.) 71.
(8) (1863) 4 B. & S. 158.
(9) [1895] 1 Q. B. 301.
(10) (1891) 90 L. T. (Journal) 227.

[COZENS-HARDY M.R. How do you reconcile your contention with what Crompton J. said in *Reg.* v. *Thomas* (1) ?]

That case is difficult to understand. It appears to be contrary to the current of authority. See also *Reg.* v. *Inhabitants of Lordsmere.* (2)

Cababé in reply.

Dec. 12. COZENS-HARDY M.R. This is an appeal from a decision of the Divisional Court holding in effect that the justices were entitled to find that a portion of a lane known as Cottimore Lane is a private street, and is not a highway repairable by the inhabitants.

There are three periods which it is convenient to consider separately. First, before the award under the Inclosure Act of 1800. There is some slight evidence that there was a road or track of some sort substantially in the line of Cottimore Lane. It is, however, impossible to say what was the nature of the road or track, nor is it material to do so, for by s. 22 of the Inclosure Act, 1800, any pre-existing road, whether public or private, was extinguished unless set out under the award which was made in 1804. The award allotted the site of the present road, subject only to a bridleway and footpath for the use of the occupiers of a farm. Secondly, from 1804 to the commencement of the Highway Act, 1835. The justices held that there was no evidence that the road had been dedicated as a public highway during this period. The fact that there were in two conveyances, dated in 1826 and 1836, express reservations of a right of way and passage for all purposes over this road, though not conclusive, is strong evidence that it was not then a public highway. I think the justices were fully justified in so holding. Thirdly, the period from the commencement of the Highway Act, 1835, to the present time. It was admitted that since the year 1864 the lane has been a highway used by both foot passengers and by vehicles, but no public money has ever been expended in the making or repairing of the road; such repairs as were done were paid for by the owners and occupiers of land and houses adjoining the lane. Alderman Sidney, who in 1864 owned the soil of the lane and adjoining

(1) 7 E. & B. 399, at p. 409. (2) (1850) 15 Q. B. 689.

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land, laid out the land as a building estate and made some new roads joining that part of the lane which lies to the north of the part in question in the present appeal. It was held by the justices that s. 23 of the Highway Act, 1835, the provisions of which have not been complied with, was fatal to the appellant's case, and the Divisional Court accepted this contention.

The real point for our decision is as to the true meaning and effect of s. 23. Apart from authority, I think the effect of s. 23 was to prevent the dedication of a highway compulsorily repairable by the public unless the conditions of s. 23 are complied with. A dedication of a highway imposed at common law a liability upon the public to keep it in repair. Since 1835 that is not necessarily the case. I agree with the decision of a Divisional Court, consisting of Cave J. and Charles J., in the case of *Fenwick* v. *Rural Sanitary Authority of Croydon Union*. (1) After stating that the road there in question was not a highway before the passing of the Highway Act, 1835, but that it had since become a highway, the judgment (at p. 223) proceeds as follows: "This finding is, in our opinion, warranted by the facts, which point to a dedication since 1835, and it must be taken therefore that the road is a highway, but not a highway repairable by the inhabitants at large, none of the formalities required by the Highway Act of 1835 before liability can be thrown upon the public having been fulfilled."

Our attention has been called to two cases in which this view has not been followed. First is the case of *Reg.* v. *Thomas*. (2) In that case a portion of the road contemplated under a Turnpike Act was never completed before the expiration of the turnpike trust, but both before and after the expiration of the turnpike trust the public had used a road in continuation of the turnpike, and the cost of repair had been borne by the parish. The Court held that there was evidence which justified a finding that the road in question had become a highway repairable by the parish. The conclusion seems to me to create no difficulty, for the payment of repairs by the parish from 1827 to 1857 was amply sufficient to justify a finding that the road had been dedicated prior to 1835, or to justify a presumption that the evidence necessary to prove

(1) [1891] 2 Q. B. 216. (2) 7 E. & B. 399.

compliance with s. 23 had been lost. See on this point the judgment of Bruce J. in the case of *Leigh Urban District Council* v. *King*. (1) There are, however, some observations in *Reg.* v. *Thomas* (2) with which I am unable to agree. I cannot think that s. 23 refers only to a case where a landowner is minded to make a road with the intention to throw upon the parish the cost of repairing it. I think it must equally apply to a case where dedication to the public is presumed from acts of user by the public with the permission of the landowner. I may add that if it be necessary in the present case to find who dedicated the road, the inference seems to me to be strong that it was dedicated at or before 1864 by Alderman Sidney.

The other case is *Healey* v. *Corporation of Batley*. (3) I confess I am unable to follow the reasoning of Bacon V.-C. as to the effect of s. 23, although I feel no doubt that his actual decision was correct.

Upon the whole I think the decision of the Divisional Court was correct, and that this portion of Cottimore Lane, though undoubtedly a highway, is not a highway repairable by the public.

This being so, the appeal must be dismissed with costs.

FARWELL L.J. I agree in the conclusion at which the Divisional Court has arrived.

At common law any landowner can dedicate his land as a highway and thereby make such highway repairable by the parish. The development of building estates and the activity of the speculative builder after the close of the Great War rendered this liability a grievous burden on many parishes, and s. 23 of the Highway Act, 1835, was passed to obviate this hardship; and it does so, not by limiting the power of landowners to dedicate their land as highways, but by preventing them from asserting the common law liability of the parish to repair except under the conditions in the Act stated. It divides highways, for the purposes of s. 23, into highways which are to be deemed "to be highways which the inhabitants of any parish shall be

(1) [1901] 1 K. B. 747. (2) 7 E. & B. 399.
(3) L. R. 19 Eq. 375.

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compellable or liable to repair," and highways which are not to be so deemed; and this is the keynote to the section. The appellant's argument is only made plausible by treating "dedication" and "proposing to dedicate" and the like, in s. 23, as referring to dedication at common law, and not to "dedication so as to be deemed a highway" within the Act, but the words "proposing to dedicate such highway" clearly refer to the highway mentioned immediately before, that is to say, a highway which the inhabitants of the parish shall be liable to repair. See *Roberts* v. *Hunt* (1), where Lord Campbell says: "We are clear that s. 23 does not touch the question of the road being a highway, but only exempts the parish from repairing it"; and the old law remains as to the dedicator, who is no more liable to repair now than he was before the Act: *Reg.* v. *Wilson.* (2)

The appellant's contention that there is no evidence to shew how, when, and under what circumstances the road in question in this case became a highway at some time after 1864 is beside the mark in a case like the present, where no special circumstances exist from which special inferences of fact could be drawn; for such a consideration is irrelevant if the dedication has been since the Highway Act. As Lord Blackburn says in *Reg.* v. *Inhabitants of Dukinfield* (3), "Then came the Highway Act; and now a road cannot become a highway" (repairable by the parish) "unless certain things are done, amongst others, unless the road be made in a substantial manner and to the satisfaction of the surveyor of the parish; and unless that has been done, the inhabitants are not compellable or liable to repair it."

The relevant question when the highway has become such since 1835 is, "How and when was it dedicated so as to be deemed a highway repairable by the parish?" The production of the certificate mentioned in s. 23 is the proper evidence of this, and it may be possible to prove it by other evidence if the absence of the certificate is accounted for, or the period of time during which the parish has in fact repaired the road be such as to raise the inference or justify the presumption omnia rite esse

(1) L. R. 15 Q. B. 17. (2) (1852) 18 Q. B. 348.
(3) (1863) 32 L. J. (M.C.) 230, 235.

acta, as suggested by Wightman J. in *Williams* v. *Eyton* (1), and by Bruce J. in *Leigh Urban District Council* v. *King*. (2) I do not agree with Phillimore J. in the latter case, at p. 753, that actual enrolment is not a necessary condition. I think that it is, but the fact of its non-production is not fatal if there are facts from which the inference that it was granted can fairly be drawn. This is the ground of the decision in *Reg.* v. *Thomas* (3), the real question in which was whether there was any evidence that the road in question became a highway repairable by the parish. The turnpike trust came to an end in that case in 1844, and the parish had done all the repairs ever since, just as they had done during all the years that the trust was in force. The Court then had no power to draw inferences of fact, such as has since been conferred by the Judicature Act, 1904, and they were of course at liberty to hold that there was such evidence before the magistrates. The observations on the construction of the Act are obiter and are not consistent with later authorities and cannot be relied on. The same remark applies to the very general observations of Bacon V.-C. in *Healey* v. *Corporation of Batley* (4), which, if read literally, would render the section a dead letter.

There are other authorities which confirm my view of the construction of s. 23. In *Fenwick* v. *Rural Sanitary Authority of Croydon* (5) Charles J. says the magistrates "find in distinct terms that B. was not a highway before the passing of the Highway Act, 1835, but that it has since become a highway . . . . it must be taken, therefore, that the road is a highway, but not a highway repairable by the inhabitants at large, none of the formalities required by the Highway Act, 1835, before liability can be thrown upon the public having been fulfilled." The facts on this appeal are precisely the same as in that case. The judgment in *Reg.* v. *East Hagbourne* (6) is to the same effect.

In the case before us, the facts stated in the case lead irresistibly to the inference that the road never has been dedicated so as to become chargeable, and was in its inception a good instance of

(1) (1859) 4 H. & N. 357.
(2) [1901] 1 K. B. at p. 755.
(3) 7 E. & B. 399.
(4) L. R. 19 Eq. 375, at p. 393.
(5) [1891] 2 Q. B. at p. 223.
(6) 28 L. J. (M.C.) 71.

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the class of road which the Legislature intended to include in s. 23. Before the award in 1804 there was an ancient lane leading from Kingston Road into Churchfield; part of this lane was allotted as 726a, and the right of user of the whole lane as a way was extinguished under the Inclosure Act (paragraphs 6 and 7 of the case), and has nothing to do with this case. I mention this, because some little confusion has arisen between this ancient lane and the road in question. The award allotted Churchfield subject to a bridleway and footpath under the north-east side thereof into the Kingston Road for the use of the occupiers of a certain farm. In 1826 Churchfield was sold and conveyed reserving a right of carriage and driftway over the site of the said bridleway and footpath to the vendors and their heirs. In 1864 one Sidney acquired Churchfield and the adjacent premises mentioned in the case, and developed a large portion as a building estate, and opened up a new road joining the private road reserved in 1826. Since the end of 1864 the whole of this new road and the old private road have been a highway used for all sorts of traffic. No public money has ever been expended on making or repairing any part of these roads, and there is no evidence that it was ever repaired by the inhabitants at large or by the respondents or their predecessors, but the road has been kept in sufficient repair by the owners of adjacent land (paragraphs 13 and 14 of the case). The inference from these facts is, to my mind, irresistible. Sidney dedicated the road as a highway, but not as a highway repairable by the parish; and no one can now so dedicate it, except in accordance with s. 23. There is no certificate under that section, and no circumstance from which it is possible to infer that such a certificate was ever granted. The non-repair by the parish is strong evidence to shew that the parish was under no liability to repair; and the repair by adjacent landowners at their own expense shews that there were persons interested in compelling the parish to repair, if there had been any such liability. Indeed, the argument is not that any certificate was ever granted, but that none is necessary.

In my opinion, this depends on a wrong construction of the statute, and this appeal fails and should be dismissed with costs.

HAMILTON L.J. I agree. This appeal relates to the first 334 yards of Cottimore Lane, after turning into it from Terrace Road. The rest of Cottimore Lane is not immediately in question. As the local authority has taken the formal steps necessary to charge the appellant with her share of the cost of making up this piece of the road, the burden is on her to shew that it is already repairable by the local authority.

I think it is clear that we cannot exercise our power of drawing inferences of fact by finding either, as the appellant suggests, a dedication before the commencement of the Highway Act, 1835, of which there is no evidence, or, as the respondents ask, an actual dedication by Alderman Sidney, of which the justices were not satisfied, though they saw the witnesses and knew more of the facts in detail than we do.

Of the period before 1840 practically nothing is known. The maps, if evidence, are on a very minute scale, and it is not even known whether the rights of way reserved in 1804, 1826, and 1836 were exercised, or whether any road was in being at all.

The questions, therefore, turn on s. 23 of the Highway Act, 1835. They are these: (1.) At the time (about 1864) when first this highway is found to have been such, was it a road made by and at the expense of any individual or private person, body politic or corporate, or (2.) was it a road set out as a private driftway or horsepath in an award of commissioners under the Inclosure Act, or (3.) if it was either, has the person, body politic or corporate, proposing to dedicate such highway, done the acts and satisfied the conditions which are set out in the remainder of the section?

The third question is easily answered. There is no evidence at all that such acts were done and such conditions satisfied. There can be no presumption that they were. The matter is not one to which the maxim omnia præsumuntur rite esse acta applies. If the burden of proof was at first on the respondents, which need not be discussed, but is not, as far as I am concerned, to be assumed, the burden was shifted by the evidence of an absence of any repair by any public authority and of the execution of necessary repairs by the occupiers of adjacent premises; thereafter the respondents have done nothing to satisfy the burden.

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Upon the face of it s. 23 of the Highway Act, 1835, is enacted in relief of the public. It severs that connection between the right of the public to use a road as a highway and the obligation of the public to repair the road, which at common law was inseverable. It does so by annexing a statutory condition to repairability (see per Blackburn J. in *Reg.* v. *Dukinfield* (1)) while leaving untouched the acquisition of a right of highway by the public against the owner of the soil. The occasion which brought before the attention of the Legislature the need of some enactment was the practice of building owners who dedicated ways across their building estates with an eye to the development of the estate irrespective of public needs, and thereby cast on the parish or its successors in obligation the cost of repairs which enured almost exclusively to the advantage of themselves and their tenants or purchasers. But the occasion which makes it necessary to pass some enactment does not prescribe the limits of the enactment which is passed. In my opinion the appellant fails so far as she founds upon the "mischief of the statute" and the injustice which is said to arise when formalities appropriate to a highway "given" to the public by express dedication are equally applied to one "taken" by the public by user tacitly suffered by the owner, and so deemed to afford evidence of some lost or unrecorded dedication. In my opinion the express general words in which the section is couched preclude any such implied limitation to be derived only from grounds of policy or history.

Upon the evidence stated in the case and the facts found by the sessions I think that this piece of road is one to which s. 23 applies on both grounds. First, it was made, after the commencement of the Highway Act, 1835, by a private person and at his expense; and, secondly, it was a road already set out as a private horsepath in such part of the award made by the commissioners empowered by the Walton Inclosure Act, 1800, and dated December 18, 1804, as referred to the allotment No. 751 in favour of Edward Peppin, subject to a bridleway along the line of the piece of road in question in favour of the occupiers for ever of the King's Farm on Lower Common. If so, the appeal fails.

(1) 4 B. & S. 158.

According to the case the appellant's predecessors in title became bound, under the allotment to them of plot No. 726a,—the land on the east side of this piece of road—to make all the fences thereof, and the land abutting on the west side is also fenced off by a hedge and ditch. The piece of road averages over twenty feet in width with a minimum width of nineteen feet six inches. The inference of fact is that the private horsepath covered so much of the site of the present road that the excess, if any, is immaterial; but upon the construction of the section I think that a road is within the section if it was originally set out as a horsepath, even though public user has subsequently extended it somewhat by lateral encroachment on adjacent ground and has obliterated the ancient limits of the horseway, while preserving its general line. I further think that a road is "made" by a private person when he suffers the public to define a line of way from point to point by habitually going to and fro upon his land, since a road thus comes into existence where there was none before. This is what the evidence points to and what I think the Sessions meant to find. It is not necessary to know who the person was or when exactly he "made" the road. The important thing is that the road should not have been made by and at the expense of the inhabitants at large or the bodies now standing in their place. The "making" of a road does not necessarily involve digging and channelling, hard core and metalling, and so forth. Under the like circumstances the road is made "at the expense" of the owner of the soil. "Expense" is not limited to out of pocket outlay or to personal expenditure of time and trouble. When an owner's exclusive right to the enjoyment of the surface is subjected to a perpetual right of passage in favour of the public, that right is acquired "at the expense"—and often the considerable expense—of the servient owner. Finally, the person "making" and the person "proposing to dedicate" are not necessarily one and the same person. If it were so, the building owner could defeat the section whenever he could buy land with roads ready made by somebody else at the time of his purchase, so that only the dedication remained for himself. Besides, the first class of "person" is wider than the second. The words are "made by" "any

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person," while the " person " who has to perform the conditions is only the " person proposing to dedicate such highway," that is to say, a highway made by anybody. The dictum of Bacon V.-C. to the contrary in *Healey* v. *Corporation of Batley* (1) cannot be supported.

The case of *Reg.* v. *Thomas* (2) presents some difficulty. In any view, it does not support the appellant's argument that highways acquired by public user are an exception from the section. With all respect to the judgment of the Lord Chief Justice in the Divisional Court, I do not think that case simply turned upon the fact that the road was a turnpike. Sect. 113 of the Highway Act, 1835, which exempts turnpikes from the operation of the Act altogether, was not relied on or cited. As a decision that the road did not come within the section because, though made by the turnpike trustees, it was not made at their expense, it may be supported, as also on the grounds suggested by the Master of the Rolls. These, however, are not the grounds on which the Court rested its decision. The ratio decidendi necessarily involved a construction of s. 23, and that adopted by two members of the Court, Coleridge J. and Crompton J., was, in a word, that the road was not made by the person proposing to dedicate it, and hence was not a road so made as to bring it within the section. Crompton J. further suggested that the making and the proposal to dedicate must in substance be contemporaneous. Even Wightman J., while stating that in his opinion this section does not apply to a road made on land which the trustees did not own, but only took under statutory powers, assumes that the section only applies to roads dedicated by some one who wants to make a road for his own purposes and at the same time to escape the liability to repair it. With these grounds of decision I cannot agree. For the reasons already given I think they are wrong.

I agree that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors : *J. Westcott & Sons ; Percy Webb.*

(1) L. R. 19 Eq. at p. 390.
(2) 7 E. & B. at p. 403 ; 3 Jur. (N.S.), pt. i., p. 713.

G. A. S.

PORT OF LONDON AUTHORITY *v.* CAIRN LINE OF STEAMSHIPS, LIMITED.

1913
Jan. 23, 28.

Docks—Weighing Goods in Dock—Statutory Right of Undertakers—Exclusive Right to weigh—Provision of Weighing Machines—Piers, Docks and Harbours Clauses Act, 1847 (10 & 11 *Vict.* c. 27), *ss.* 81, 82.

Sects. 81 and 82 of the Piers, Docks and Harbours Clauses Act, 1847, which upon certain conditions give the undertakers the exclusive right of weighing and measuring goods loaded or discharged in their docks, do not give them the exclusive right of providing the weighing machines.

ACTION tried before Scrutton J. as a commercial cause.

The Surrey Commercial Dock Act, 1864 (27 Vict. c. xxxi.), incorporated ss. 81 and 82 of the Harbours, Docks and Piers Clauses Act, 1847 (1), and by s. 115 gave the company power from time to time to appoint and license so many persons as the company might think fit to be meters and weighers within the limits of the docks.

By the Port of London Act, 1908 (8 Edw. 7, c. 68), s. 3, the undertakings of the Surrey Commercial Dock Company were transferred to and vested in the plaintiffs with all the rights, powers, and privileges of the company.

(1) 10 & 11 Vict. c. 27, s. 81: "Where under the special Act the undertakers shall have the appointment of meters and weighers, the undertakers may appoint and license a sufficient number of persons to be meters and weighers within the limits of the harbour, dock, and pier, and remove any such persons at their pleasure, and may make regulations for their government, and fix reasonable rates to be paid, or other remuneration to be made to them for weighing and measuring goods."

Sect. 82: "When a sufficient number of meters and weighers have been appointed by the undertakers, under the powers of this and the special Act, the master of any vessel, or the owner of any goods shipped, unshipped, or delivered within or upon the harbour or dock or pier, shall not employ any person other than a weigher or meter licensed by the undertakers, ... to weigh or measure the same; and if in such case any person other than a meter or weigher licensed by the undertakers, ... shall weigh or measure any such goods as aforesaid, such person, as well as the person by whom he shall be employed, shall for every such offence be liable to a penalty not exceeding five pounds, and the weighing or measurement of any such goods by any such person shall be deemed illegal."

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The defendants had used these docks under an agreement which expired in 1910, and after that date under a temporary arrangement which was made without prejudice to the rights of either party. The defendants discharged their grain steamers in the docks by means of hopper elevators, which when adjusted recorded the weight of the grain, and they employed their own men to work these elevators and record the weights.

The plaintiffs had appointed and licensed a sufficient number of meters and weighers, but they had not fixed any scale of charges for weighing and measuring goods.

The plaintiffs claimed a declaration that they have the sole right of weighing and measuring any goods shipped, unshipped, or delivered within that portion of the plaintiffs' undertaking known as the Surrey Commercial Dock system, and that the use by the defendants without the consent of the plaintiffs within that system of any apparatus which weighs or measures automatically or otherwise any goods shipped, unshipped, or delivered within the system is an infringement of the plaintiffs' right, and particularly that the use without the consent of the plaintiffs within the system of grain elevators which weigh or measure grain shipped, unshipped, or delivered within the system is an infringement of the plaintiffs' right.

George Wallace, *K.C.*, and *A. F. Wootten*, for the plaintiffs.

J. R. Atkin, *K.C.*, *Maurice Hill*, *K.C.*, and *F. D. Mackinnon*, for the defendants. [They referred to *Dick* v. *Badart* (1), *Whiting* v. *Carpenter* (2), and *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*. (3)]

Cur. adv. vult.

Jan. 28. SCRUTTON J. In this case the Port of London Authority sue the Cairn Line of Steamships, Limited, who use the Surrey Commercial Dock, for a declaration and injunction.

The Cairn Line discharge their bulk grain steamers by an elevator, which, when adjusted, also records the weight of the grain. The Port of London Authority desire a declaration that

(1) (1883) 10 Q. B. D. 387. (2) (1871) 24 L. T. 576.
(3) [1892] 3 Ch. 242.

they alone have a right to weigh cargo and to provide the weighing machine; which, if granted, would indirectly prevent the defendants from using their elevator.

The law stands as follows. Where under their special Act the undertakers have the appointment of meters and weighers (and in this case the plaintiffs have under s. 115 of the Surrey Commercial Dock Act, 1864, and the Port of London Act, 1908, such appointment) they may, by s. 81 of the Harbours, Docks and Piers Clauses Act, 1847, appoint and license a sufficient number of persons to be meters and weighers, make regulations for their government, and fix reasonable rates to be paid.

In this case the Surrey Commercial Dock Company and the plaintiffs have had for many years persons described as grain weighers, some of their permanent staff, some temporarily employed, who in fact weigh grain. They have made no special regulations for their government; the weighers are usually employed where the dock does the discharging, and a rate has been fixed "for working out, weighing, and delivering overside." As no one has asked the Port Authority to weigh a cargo not worked by the Authority, no special rate for weighing only has yet been fixed by the Authority and published as provided in s. 113 of the Surrey Commercial Dock Act, 1864.

Sect. 82 of the Harbours, Docks and Piers Clauses Act, 1847, provides: [His Lordship, having read the section and reviewed the history and facts of the case, proceeded:]

The plaintiffs have apparently taken the view that by claiming the sole right of weighing and of providing the machine for weighing they can indirectly get rid of the elevators; and accordingly, by writ issued June 19, 1912, the plaintiffs claim a declaration that they have the sole right of weighing and providing weighing machines, and that the elevators of the defendants are, as weighing machines, infringements of this right.

The defendants make a number of replies. They say that they do not employ men to weigh in the elevators. They in fact have men who adjust the weighing machine and record the weights the machine shews, and this contention of the defendants seems to me absurd. They say that they have rights under the agreement of 1904, and subsequent history, to use the elevators. It

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will be seen from my statement of the history of the case and my findings that I disagree with this contention. They say that the plaintiffs have not appointed and licensed a sufficient number of meters in the Surrey Dock. I find that a sufficient number of meters have been appointed.

I hold on the first part of the declaration that the plaintiffs, on fixing with the proper formalities a rate to be paid for the work of weighing, have the sole right of weighing the grain discharged by the defendants. This, however, though the defendants deny the plaintiffs' right on the pleadings, they have by letters offered to comply with, by employing the plaintiffs' properly appointed meters, and it is quite a minor point of the dispute. But the plaintiffs' serious claim is that, having the sole right to weigh, they have also the sole right to provide the weighing machines. I am unable to accept this contention. Sect. 82 of the Harbours, Docks and Piers Clauses Act, 1847, which gives the plaintiffs the sole right to weigh by imposing a penalty on masters or on owners of goods employing unauthorized weighers, contains no words prohibiting the masters or owners of goods from employing weighing machines other than those of the dock company. I can find no provision in the general or special Acts to that effect. There was no evidence that these elevators were improper weighing machines, and in fact they are all inspected and stamped by the county council inspectors. It is notorious that ships constantly weigh on deck with their own or consignees' scales, and I can find no prohibition of this practice.

I therefore grant the plaintiffs a declaration that on due publication of rates for weighing they have the sole right of weighing and measuring any goods shipped or unshipped in the Surrey Commercial Dock, but not the sole right of providing weighing machines for such weighing. I decline to grant an injunction, because I have no doubt that the defendants will comply with the declaration made, and because the plaintiffs have not yet published rates for this service.

Judgment accordingly.

Solicitors for plaintiffs: *E. F. Turner & Sons.*
Solicitors for defendants: *Parker, Garrett & Co.*

J. H. W.

ECCLESIASTICAL COMMISSIONERS *v.* UPJOHN AND ANOTHER.

1913
Jan. 30, 31.

Tithe Rentcharge—Recovery—Distress or Receiver—Owner in Occupation of Part only of the Lands—Tithe Act, 1836 (6 & 7 *Will.* 4, *c.* 71), *s.* 12—*Tithe Act*, 1891 (54 & 55 *Vict.* *c.* 8), *s.* 2.

Sub-s. 2 of s. 2 of the Tithe Act, 1891, which provides that tithe rentcharge issuing out of any lands shall, when "the lands are occupied by the owner thereof," be recovered by distress, applies only when the owner is in occupation of the whole of the lands.

APPEAL of the defendant Upjohn from the Marylebone County Court.

The plaintiffs were the owners of tithe rentcharge issuing out of certain lands. The rentcharge being in arrear for two years and the sum of 2*l.* 14*s.* 4*d.* being due, the plaintiffs duly gave notice of an application to the county court, under the Tithe Act, 1891, for an order for the recovery of that sum. The application stated that the defendant Upjohn was the owner of the lands, and that the occupiers were the defendant Rodwell and others, and that Rodwell occupied a portion thereof; and asked for execution of the order for recovery by the appointment of a receiver.

Upjohn was the owner in fee of the whole of the lands out of which the tithe rentcharge issued. Rodwell was the lessee of a part of the land under a building lease for ninety-nine years at a ground rent, and he occupied the house built upon that part of the land; and other parts of the land were leased to and occupied by other persons in the same way. The remainder of the land was unlet.

Upjohn duly gave notice of his desire to oppose the application upon the ground that he was not the owner of the lands in respect of which the application was made and that Rodwell and the other leaseholders of the premises erected on the lands were liable for payment of the tithe rentcharge issuing out

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of the lands, by virtue of the provisions of the Tithe Acts, 1836 and 1891 (1), and the authority of the case of *Peed* v.

(1) 6 & 7 Will. 4, c. 71, s. 12: "In the construction and for the purposes of this Act, unless there be something in the subject or context repugnant to such construction, ... the words 'land owner' or 'tithe owner' or 'owner of lands' or 'owner of tithes' shall mean and include every person who shall be in the actual possession or receipt of the rents or profits of any lands or tithes (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two thirds of the clearly yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof), and that without regard to the real amount of interest of such person; and in every case in which any tithes or lands shall have been leased or agreed to be leased to any person for life or lives, or for years, by any lease or agreement for a lease on which a rent less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease or agreement for a lease shall, jointly with the person who shall be liable to the payment of such rent of such tithes or lands, be deemed for the purposes of this Act to be the owner of such tithes or lands."

54 & 55 Vict. c. 8, s. 2: "(1.) Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the Court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rentcharge as defined by this Act shall not be recovered in any other manner.

"(2.) Where it is shown to the Court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the Court of an officer who, subject to the direction of the Court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers; and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the lands under section 82 of the Tithe Act, 1836.

"(3.) In any other case the order shall be executed by the appointment by the Court of a receiver of the rents and profits of the lands, and of any other lands which would be liable to be distrained upon for the tithe rentcharge to which the order refers under the provisions

King. (1) Rodwell also gave notice of opposition on the ground that he was not the owner of the lands in respect of which the application was made.

At the hearing, on September 30, 1912, Upjohn did not, but Rodwell did, appear. The county court judge made an order for the recovery of the tithe rentcharge and appointing a receiver, in Form 8 under the Tithe Rentcharge Recovery Rules, 1891, to receive the rents and profits of the lands out of which the tithe rentcharge issued. That order was drawn up; notice thereof and to attorn to the receiver was given to Rodwell; and Rodwell forthwith attorned and paid the amount due to the receiver.

Subsequently, on October 17, Upjohn appeared before the county court judge and applied that the order of September 30 should be set aside and a new trial had upon the grounds (1.) that the order was incorrect in describing Upjohn as the owner of the lands; and (2.) that, having regard to the decision in *Peed* v. *King* (1), the judge misdirected himself in not directing that the order should contain a declaration that the same was not to apply to the ground rents payable to the freeholder of the lands and that the receiver was to receive only the rack rents payable by the occupiers of the lands.

The county court judge refused the application upon the ground that Upjohn had given no satisfactory explanation of his failure to appear at the original hearing, and that after the order had been drawn up and complied with he had no power to grant a new trial or to alter the order upon the ground that it was wrong in law.

Upjohn appealed under s. 7 of the Tithe Act, 1891.

G. C. Whiteley, for the appellant. The order for recovery of this tithe rentcharge by a receiver was wrong; the order ought to have been for distress. Sub-s. 2 of s. 2 of the Tithe Act,

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of section 85 of the Tithe Act, 1836, ..."

Sect. 9: "(1.) A reference in this Act to the 'owner' of lands or tithe rentcharge,—

. . . . . .

"(*c*) in any other case, means the same officers or persons as are mentioned in the Tithe Act, 1836."

(1) (1894) 11 Times L. R. 18.

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1891, provides that where "the lands are occupied by the owner thereof" the order for recovery of the tithe rentcharge shall be executed by distress; and sub-s. 3 that in every other case it shall be executed by the appointment of a receiver. The Tithe Rentcharge Recovery Rules, 1891, provide two forms: Form 8, which is for the appointment of a receiver when the lands are not occupied by the owner, and Form 9, which is an order for distress when the lands are occupied by the owner. This order was made in Form 8, but it ought to have been in Form 9. By virtue of the definition of owner in s. 12 of the Tithe Act, 1836, Rodwell was jointly with the appellant the owner of the land, and therefore the case comes within sub-s. 2 of s. 2 of the Act of 1891, and not within sub-s. 3.

Even if this is a case in which an order for a receiver can be made under s. 2, sub-s. 2, yet according to the authority of *Peed* v. *King* (1) the order ought to be limited so as to exclude the ground rent payable to the appellant.

Basil Watson, for the respondents. According to the definition in s. 12 of the Act of 1836 the appellant is the owner; he is not in occupation; and therefore the order for a receiver was rightly made. Further, Rodwell was not in occupation of all the lands, and sub-s. 2 of s. 2 must refer only to the case in which the owner is in occupation of all the lands.

This case is quite different from *Peed* v. *King*. (1) There all the land was let upon building leases, and the order had not been drawn up and completed. Here the order was drawn up and was acted upon. This point was not taken at the hearing, and it is now too late to raise it.

G. C. Whiteley, in reply. This appeal is under s. 7 of the Tithe Act, 1891, and not under s. 120 of the County Courts Act, 1888, and the right of appeal is not so restricted under this Act as under the County Courts Act.

RIDLEY J. I think that the decision of the learned county court judge was correct and must be upheld. The question in this case arises as to a piece of land of which Upjohn was the owner, in the sense that he was the owner and actual occupier

(1) 11 Times L. R. 18.

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of some portion of it, and as to the rest was the owner of the ground rents issuing therefrom. Rodwell was occupier of a portion, and some other gentlemen were occupiers of other parts. There were, therefore, several occupiers; and there were certainly several owners within the statute, because the Tithe Act, 1836, enacts that, where there is a lessee for a long term such as Rodwell, the owner of the ground rent, such as Upjohn, shall, jointly with the lessee, be deemed for the purposes of the Act to be the owner of the land: so that Rodwell and Upjohn were jointly owners of that portion of the land which Rodwell occupied.

The question arose before the learned judge as to whether the order was to be made under Form 8 or 9. Form 8 is an order for a receiver and applies to the case where the lands are not occupied by the owner; and Form 9 is an order for distress where the owner of the lands is in occupation. We have, therefore, to ascertain whether the learned judge was right in applying Form 8 and not Form 9. I think that depends upon sub-s. 2 of s. 2 of the Tithe Act, 1891: "Where it is shown to the Court that the lands are occupied by the owner thereof, the order shall be executed" by distress. I think that the only case to which Form 9 applies is where the owner of the lands is in occupation of all the lands which are subject to the tithe rentcharge. In that case one can understand how it could apply, but where the owner occupies only a portion of the land and does not occupy the rest, I think the proper order is under Form 8, which the learned judge used. Therefore, although no doubt there may be some difficulty in construing and applying the Act, I think that is its true meaning. Where the lands are not all occupied by the owner, Form 8 applies; but where the lands which are subject to the tithe rentcharge are all in the occupation of the owner, then an order for distress must be made.

So far I think that the order was right; but we are asked to make a declaration that the ground rent which is due from Rodwell to Upjohn is not to be taken by the receiver, and we are referred to *Peed* v. *King* (1) as an authority for that submission.

(1) 11 Times L. R. 18.

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Now, that case is not at all like the present case. First of all, the order there had never been drawn up; and, secondly, so far as I can see, the whole of the land was in the occupation of the owner. It was possible, therefore, for the Court there to do that which appeared to be equitable; but it is not possible for us to do it here. The order here has been drawn up; there is no declaration attached to it; and the point was not taken at the proper time before the learned judge.

I am, therefore, clearly of opinion that this appeal ought to be dismissed.

LUSH J. The appellant has raised two points. The first point is that this is a case which is covered by s. 2, sub-s. 2, of the Tithe Act, 1891, because the lands are occupied by the owner. That sub-section applies to a case where the lands which are the subject-matter of the application are occupied by the owner. The tithe issues out of the whole of the land, or, one may say, out of each portion of it.

Sect. 2, sub-s. 1, uses this language: [His Lordship read the sub-section.] There "the lands" must mean the whole of the lands out of which the rentcharge issues; and it is obvious that every one who can be affected ought to have notice, and therefore the words "after such service on the owner of the lands" must mean all the owners of the land affected by the application.

Then sub-s. 2 shews how the rent-charge is to be recovered where the lands are occupied by the owner; it is to be recovered by distress. Now, inasmuch as this application was not confined to the portion occupied by Rodwell, but was, on the contrary, a notice of application which extended to the whole of the lands out of which the rentcharge issued, it seems to me clear that it is not a case in which it can be said that the lands are occupied by the owner and, therefore, that sub-s. 2 does not apply. Sub-s. 3 says what is to be done if sub-s. 2 does not apply: "In any other case"—that is this case, among others—"the order shall be executed by the appointment by the Court of a receiver of the rents and profits." In my opinion this is not a case which is governed by any other provision than sub-s. 3, or, in other words, the only order that the learned county court judge could

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make was the order for the appointment of a receiver. That being so, one need not trouble about Forms 8 and 9, although the same observations apply if one does look at them. Form 9 is an order for distress where the owner of the lands is in occupation; and in this case, as I have said, the owner of the lands is not in occupation. That is sufficient to dispose of the first point.

The second point taken is that, assuming the order for a receiver was right, a declaration ought to be added as in *Peed* v. *King*. (1) If this had been a case like that, it seems to me that an extremely difficult question might arise. I think that the point which pressed the Court in *Peed* v. *King* (1) was this, that if the ground landlord who has reserved a rent of, say, 20*l*. a year is one of the owners referred to in the statute, he would under an order for a receiver have in effect to pay the whole of the tithe even if it amounted to 20*l*., and there is apparently no machinery by which he could recover it from the person who ought really to pay, that is, the lessee who is the person beneficially entitled to the profits of the lands.

That point does not really arise in this case. It must be observed that in *Peed* v. *King* (1) the whole of the land was owned and occupied by one person, that is, the lessee, the order had not been drawn up, and the person asking for the declaration had apparently appeared before the county court judge. In this case the appellant did not appear at the hearing. It is true that he gave notice of opposition, but that was all. He was not, in the words of s. 2, sub-s. 1, an owner who "appears and desires to be heard." He allowed the judge to complete his order for a receiver and the lessee to attorn to the receiver; but he afterwards thought he would like to take the point and argue it and apply for a new trial. It is now contended for the appellant that he can raise the point here and ask us to apply the principle which was acted upon in *Peed* v. *King* (1), although he could not have done so if this had been an appeal under the County Courts Act, 1888, because the point was not taken in the county court. There may be something to be said for the contention that upon a literal interpretation of s. 7 of the Tithe Act, 1891, which apparently

(1) 11 Times L. R. 18.

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gives a more unfettered right of appeal than the County Courts Act, the point need not have been taken. I do not say whether that is so or not, for in the circumstances of this case I think it was too late to take this point, even if it was a good one, because the appellant did not appear at all and allowed the order to be completed. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Morgan & Upjohn.*
Solicitors for respondents: *Milles, Jennings, White & Foster.*

J. H. W.

C. A.

1912
Nov. 20, 21; *Dec.* 3.

[IN THE COURT OF APPEAL.]

GUARDIANS OF PADDINGTON, APPELLANTS *v.* GUARDIANS OF ST. MATTHEW, BETHNAL GREEN, RESPONDENTS.

Poor Law—Pauper—Settlement—Irremovabilty—Deserted Wife—Acquisition of Settlement by Residence—Poor Removal Act, 1861 (24 & 25 *Vict. c.* 55), *s.* 3—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A deserted wife can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, acquire a settlement by residence in a parish for three years in such manner and under such circumstances in each of those years as would render her irremovable therefrom.

Decision of the Divisional Court [1912] 2 K. B. 335, affirmed.

APPEAL from the decision of a Divisional Court (1) upon a case stated by quarter sessions.

The case is set out in the report in the Court below. The facts may be shortly stated as follows:—

Upon the complaint of the guardians of St. Matthew, Bethnal Green, an order was made by a metropolitan police magistrate adjudging the last legal settlement of Hetty Gosling, a pauper, to be in the parish of Paddington. She was the wife of Arthur Gosling, to whom she was married in 1895, and by whom she was deserted in 1897. The last legal settlement of the husband was Portslade-by-Sea, in the Steyning Union, such settlement

(1) [1912] 2 K. B. 335.

having been acquired by him by renting and rating in respect of a tenement from June, 1907, to August, 1908. Since the desertion by her husband the pauper had resided in the parish of Paddington for three years and upwards, from 1902 to 1907, in such manner and under such circumstances in each of such years as would, in accordance with s. 3 of the Poor Removal Act, 1861, as amended by s. 17 of the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), render her irremovable therefrom.

The Paddington guardians appealed to the Court of quarter sessions, who quashed the order.

The guardians of St. Matthew, Bethnal Green, then appealed to the Divisional Court, who allowed the appeal, holding that a deserted wife can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, acquire a settlement by residence in a parish for three years in such manner and in such circumstances in each of those years as would render her irremovable therefrom. From that decision the Paddington guardians now appealed.

J. F. P. Rawlinson, K.C., and *Herbert Davey*, for the appellants. The question turns upon the construction of ss. 34 and 35 of the Divided Parishes Act, 1876. (1)

It is submitted that s. 34 did not apply to a married woman because she was at that time a person incapable of acquiring a settlement for herself and it required an express provision to

(1) 39 & 40 Vict. c. 61, s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

Sect. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

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enable her to do so. The words "any person" mean any person capable of acquiring a settlement as the law then stood. Down to 1876 a married woman could not acquire a settlement: Bott's Poor Laws, 5th ed., vol. ii., p. 75; and the Legislature in the Divided Parishes and Poor Law Amendment Act, 1876, did not use the word "person" in any wider sense than it had been used in previous Poor Law Acts. Sect. 34 did not alter the common law by which a married woman was one with her husband and consequently could not acquire a settlement different from his. Sect. 35, which abolishes derivative settlements, expressly excepts the case of a wife deriving a settlement from her husband, and that exception was made in order to meet the state of the common law at that time. This view is borne out by both s. 1 of the Poor Removal Act, 1846, and s. 3 of the Poor Removal Act, 1861, under which latter section a deserted wife can acquire only a defeasible irremovability, for once her husband returns to her, her irremovability ceases.

Moreover, s. 35, by expressly exempting the derivative settlement of a married woman, cuts down the operation of s. 34 by excluding from it the case of a married woman, and so long as her derivative settlement lasts she cannot acquire a settlement under s. 34: per Lord Watson in *Medway Union* v. *Bedminster Union*. (1)

There is no case which says that a married woman can acquire a settlement apart from her husband. *West Ham Union* v. *Holbeach Union* (2), *Fulham Parish* v. *Woolwich Union* (3), and *Hackney Union* v. *Kingston-upon-Hull Incorporation for the Poor* (4) were cases of children under ss. 34 and 35, but in not one of them was the question of a married woman considered. It was there held that a child under sixteen could acquire a settlement under s. 34, but that is not applicable by analogy to the case of a married woman, for a child could always acquire such a settlement, whereas a married woman could not.

The appellants rely upon *Rutherglen Parish Council* v. *Glasgow Parish Council* (5), in which under s. 1 of the Poor Law (Scotland)

(1) (1889) 14 App. Cas. 465, 487.
(2) [1905] A. C. 450.
(3) [1907] A. C. 255.
(4) [1912] A. C. 475.
(5) [1902] A. C. 360.

Act, 1898,—which section is, if anything, wider and less favourable to their contention—it was held that a married woman deserted by her husband cannot acquire a settlement different from his; and also upon the observations of Lord Watson in *Medway Union* v. *Bedminster Union*. (1)

Reg. v. *Maidstone Union* (2), followed in *Southwark Union* v. *City of London Union* (3), raised this point of a married woman acquiring a settlement under s. 34, but the Court decided the question as one of irremovability under s. 3 of the Poor Removal Act, 1861, and declined to express an opinion on s. 34.

The judgments in the Court below (4) turned on what was decided in *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union* (5), but that case has since been to the House of Lords, and Lord Loreburn in his judgment said that he was not considering the case of a wife (6), an observation which cuts away the ratio decidendi in the Divisional Court. If the decision of that Court is right, s. 34 would apply to every married woman, and then there would arise the possibility of a husband and wife, in a case where there was no suggestion of desertion, each acquiring a different settlement, which would be absurd.

Macmorran, K.C., and *W. L. L. Bell*, for the respondents. From earliest times a married woman acquired the settlement of her husband. If he had none it was thought, however, that her maiden settlement was not suspended during coverture: *Rex* v. *Inhabitants of St. Botolph's without Bishopsgate*. (7)

Speaking generally, a married woman can have no other settlement than that of her husband. By the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, it is enacted that no person should be removed from any parish in which he or she should have resided for five years, provided that whenever any person should have a wife or children having no other settlement than his or her own such wife and children should be removable whenever he or she is removable, and should not be removable when he or she is not removable.

(1) 14 App. Cas. 465, 484, 487.
(2) (1879) 5 Q. B. D. 31.
(3) [1906] 2 K. B. 112.
(4) [1912] 2 K. B. 335.
(5) [1911] 1 K. B. 748.
(6) [1912] A. C. 475, 482.
(7) (1755) Burr. Settmt. Cases, 367.

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That proviso was repealed and a fresh proviso enacted by the Poor Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1. The effect of that legislation was considered in *Guardians of Poor of West Ham* v. *Churchwardens of St. Matthew, Bethnal Green.* (1) By the Poor Removal Act, 1861, an inroad was made upon the doctrine that a married woman could not acquire a settlement. Sect. 3 of that Act gave a deserted married woman the right to remain where she was without being removable to the settlement of her husband. The Divided Parishes and Poor Law Amendment Act, 1876, purports to convert irremovability into settlement. There is no reason why that settlement should not extend to a deserted married woman.

It was directly decided in *Reg.* v. *Maidstone Union* (2) that a deserted married woman can acquire a settlement in her own right. It is true that in *Rutherglen Parish Council* v. *Glasgow Parish Council* (3) it was held that a deserted wife could not acquire a settlement different from that of her husband, but none of the English cases and statutes were cited before the House of Lords. It was a decision in a Scottish case and upon a Scottish statute and does not therefore conclude this case. The word "person" in s. 34 of the Act of 1876 is a word of general application and is not qualified by s. 35, so that it applies to a deserted wife who has by virtue of s. 3 of the Act of 1861 acquired the status of irremovability: *West Ham Union* v. *Holbeach Union* (4); *Fulham Parish* v. *Woolwich Union* (5), where all the authorities were cited. In *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union* (6) an attempt was made to distinguish the case of legitimate from that of illegitimate children. It was a strong decision and the Court again declined to treat s. 35 as an exception from s. 34. Sect. 34 is in perfectly general terms, and there is no reason why it should not apply to a deserted married woman whose status in this matter has been the subject of special legislation. If this woman has not become irremovable she may have to be sent a long distance to the settlement of her husband. The object of s. 34

(1) [1894] A. C. 230.
(2) 5 Q. B. D. 31.
(3) [1902] A. C. 360.
(4) [1905] A. C. 450.
(5) [1907] A. C. 255.
(6) [1911] 1 K. B. 748.

was to simplify the law and to avoid the expense of difficult inquiries in such cases.

H. Davey in reply.

Cur. adv. vult.

COZENS-HARDY M.R. The question in this appeal is whether a wife deserted by her husband under circumstances rendering her irremovable by virtue of s. 3 of the Poor Removal Act, 1861, can be "deemed to be settled" in the parish in which she has resided under s. 34 of the Divided Parishes Act, 1876.

It is no doubt true that until recent legislation a married woman could not acquire a settlement apart from her husband. Her settlement was derived from his. But s. 34 constituted *residence* for the statutory period as a foundation for a new settlement. Unless the word "any *person*" in s. 34 is to be read as excluding a deserted married woman, s. 34 clearly covers the case. She is "irremovable in accordance with the several statutes in that behalf"—i.e., s. 3 of the Act of 1861.

Whether it be more correct to say that she is to be "deemed to be settled" rather than to have acquired a settlement I do not pause to consider. The policy of the statutes is consistent and only consistent with the interpretation which I put upon s. 34.

I should add that a married woman, not deserted by her husband, is *not* within s. 34.

Our attention was called to several cases in the House of Lords which, in my opinion, do not govern the present case and are only important as establishing that s. 34 and s. 35 are independent enactments.

I think the decision of the Divisional Court was correct. The judgment of Pickford J. so fully expresses my views that I have not thought it necessary to elaborate my reasons.

The appeal must be dismissed with costs.

FARWELL L.J. The question on this appeal depends, in my opinion, entirely on the construction of ss. 34 and 35 of the Divided Parishes Act, 1876, and is practically concluded although not strictly covered by decisions in the House of Lords on these sections. I take the law prior to that Act to be as stated in *Rutherglen*

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Parish Council v. *Glasgow Parish Council.* (1) That case was strongly pressed upon us as a decision relevant to and conclusive of this appeal; but it is clearly not so. I assume the general law on the subject to be the same in England and Scotland, but the Scotch statute on which that case was decided differs toto cœlo from the English Act. The Scotch Act is a disabling statute, giving nothing to any one, but containing express words of exclusion, and the case therefore depended on the pre-existing law; the English Act is an enabling Act and the only question is to what extent its enabling effect can be carried. A decision of the House of Lords on a Scotch appeal depending on the construction of an Act extending to Scotland alone is no authority on an English case depending on a statute extending to England alone and drawn on different lines and expressed in different language.

Turning now to s. 34 of the Divided Parishes Act, we find that every person who has acquired statutory irremovability in any particular parish "shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." The pauper in this case is a married woman deserted by her husband for many years and has therefore acquired the requisite statutory irremovability under the Act of 1861. This is not disputed, but it is argued that s. 34 cannot apply to her because she would not have "acquired" a settlement on resuming cohabitation, but would "derive" from her husband, either by resumption of her former or by creation of a new derivative settlement; but this argument would apply equally to a spinster: the words "or otherwise" are elliptic and should be expanded into "or otherwise obtain a settlement in some other parish by a like residence or by some other lawful means."

Then it is said that s. 35 is inconsistent with s. 34 and cuts down the generality of the phraseology: I am wholly unable to follow this. Sect. 35 provides that no person "shall be deemed to have derived a settlement from any other person . . . . except in the case of a wife from her husband." The proviso relates to the inception of the settlement and leaves its continuance or

(1) [1902] A. C. 360.

discontinuance to the general law, including s. 34. I can see nothing inconsistent in saying that a wife shall be deemed to have derived from her husband as heretofore, but if she be deserted for a sufficient period to give her irremovability in a particular parish, she shall acquire a new settlement in that parish: s. 35 does not say that she shall be deemed to have derived and shall—notwithstanding s. 34—actually continue to retain her husband's settlement. I think the case of the wife is even clearer than that of the children decided by the House of Lords in the *Hackney Case.*(1) Take the Lord Chancellor's statement at p. 481 and read "wife" for "Mabel" and I see no distinction. It was argued that although a child under sixteen could acquire a settlement, it was so repugnant to the law of settlements that a wife could do so independently of her husband, that we ought to restrict the apparent generality of s. 34. But the words of the Act are clear: "any person" clearly includes a married woman: such a woman is clearly capable of becoming irremovable: Parliament can unquestionably turn irremovability into settlement if it chooses; and I fail to see how we can assume that the Legislature does not intend those words to have their plain meaning because it will result in an alteration of the law: such a doctrine would render many recent Acts of Parliament quite innocuous.

My own opinion is that Cockburn C.J. and Manisty J. in *Reg.* v. *Maidstone Union* (2) decided this point: the first question in that case for the opinion of the Court is explicit: "Did the pauper lunatic acquire a settlement by residence in the parish of Chatham . . . . in her own right under s. 34 of 39 & 40 Vict. c. 61?" and Manisty J. says at p. 34: "she can so reside as to gain a settlement apart from him, unless he returns to cohabit with her." The report in the *Law Times* differs, but makes Cockburn C.J. say, at p. 587, "The pauper has therefore by the recent Act of 39 & 40 Vict. c. 61, s. 34, acquired a settlement in the respondents' union." The fact that the *Law Journal* report of the same case omits these words and deals only with the point of desertion is certainly not enough to throw any doubt on the fact that words were spoken

(1) [1912] A. C. 475.
(2) 5 Q. B. D. 31; 49 L. J. (M.C.) 25; 41 L. T. 586.

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to the effect reported in the *Law Reports* and *Law Times*. So too in *West Ham Union* v. *Holbeach Union* (1) Lord Halsbury says of this statute, it "has turned a status of irremovability into a settlement"; and in *Fulham Parish* v. *Woolwich Union* (2) Lord Loreburn L.C. says, "and to my mind s. 34 of the Act of 1876 was intended to say and did say that all persons of whatever age and whether legitimate or not who had a status of irremovability should be also endowed with a settlement." Statements to the same effect will be found by Field J. in *Reg.* v. *Cookham Union* (3) and by Vaughan Williams L.J. and Fletcher Moulton L.J. in *Southwark Union* v. *City of London Union*. (4)

I am of opinion that the Divisional Court was quite right and this appeal should be dismissed with costs.

HAMILTON L.J. I am of the same opinion.

To my mind the real question is whether a "deserted" wife is a "person" within 39 & 40 Vict. c. 61, s. 34. It is best to begin with the construction of the words of the enactment itself. A "person" of whom certain conditions as to residence can be predicated does not thereby acquire a settlement but "shall be deemed to be settled" in the parish of his residence. In plain English a deserted wife would appear to be a "person." Apart from the Interpretation Act, the interpretation clause, s. 44 of the Act of 1876 places on words contained in the Act the same construction as in the Poor Law Amendment Act, 1834, and the Acts amending the same, and s. 109 of that Act says that "the word 'person' shall be construed to include any body politic . . . . as well as any individual," and "wherever in this Act in describing any person or party . . . . the masculine gender only is used the same shall be understood to include . . . . females, as well as males."

Prima facie then a "deserted" wife is within s. 34, and a "wife" is clearly within the word "person" in s. 35. The pauper in this case is a deserted wife, and everything has occurred which, under the several statutes in that behalf,—the Poor Removal Act of 1861, s. 3, in especial—is required to make her irremovable. It is true that a wife who is not deserted is not

(1) [1905] A. C. 452
(2) [1907] A. C. 259
(3) (1882) 9 Q. B. D. 522.
(4) [1906] 2 K. B. 112.

within the section, but this is partly because she derives "irremovability" not from "statutes in that behalf," but from the fact of her husband's irremovability, and partly because s. 35, while abolishing most of the pre-existing cases of derivative settlement, preserves that of a wife. The two sections are independent of, though consistent with, each other. The first deals with acquired settlement; the second with derived settlement. Taken together, by expressly keeping alive a wife's derivative settlement on the one hand, and, on the other, conferring an acquired settlement of her own on a person of whom it can be said that, as a deserted wife, she has acquired irremovability, they make the case of a deserted wife an exception to the old rule, that during coverture a woman takes her husband's settlement. It is true that this rule was long a fundamental proposition of English settlement law. It is true also that under the numerous statutes on the subject since 14 Car. 2, c. 12, "persons" have been enabled to acquire settlements under various conditions, but down to 1876 married women have not been included among them; they were deemed to be incapable of acquiring settlements of their own. It is argued that in the Act in question "person" must be read as either (1.) a "person capable of acquiring a settlement" so as to exclude all married women, or as (2.) a "person" not being a married woman. I cannot agree in this. The combined effect of the two positive enactments, ss. 34 and 35, is in itself sufficient to determine the matter. They enact the general rule as to the capacity of married women and the exception to it. There is no necessity to resort to the older statutes in order to construe the present one. The fact that the irremovability of a deserted wife under the Poor Removal Act of 1861, s. 3, is defeasible by the husband's return and the resumption of cohabitation introduces no difficulty. She might always annul her own irremovability by removing herself voluntarily. She can always defeat her acquired settlement by marrying again, if her husband dies. In either case she is, in the meantime, irremovable under the one Act and deemed to be settled under the other.

It was said that unless "person" in s. 34 is interpreted in the limited sense suggested, all married women will obtain

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settlements of their own after the lapse of the necessary term of residence under the Poor Removal Act, 1846, s. 1, as amended by the Poor Removal Act, 1848. I cannot follow this. There is no question as to the interpretation of the Act of 1846. Under that Act a "person" who obtains a settlement in accordance with s. 1 clearly does not include a married woman living with her husband. No one suggests that it does. The effect given by the Courts to the mention of "persons" in the prior Acts cannot in this connection be relied on as furnishing an authoritative interpretation of the word when used in the Act of 1876. What led to the rule that the wife's settlement followed her husband's was the general common law theory of the unity of married women with their husbands, and the view, taken by humane judges, that families, though paupers, should not be broken up. The rule was not derived from any judicial interpretation of particular enactments. Before 1876 a change had taken place both in the views taken of the position of married women generally (see the Married Women's Property Act of 1870, especially s. 13) and of the power of the Courts to apply statutes otherwise than in strict accordance with their language, and this makes it reasonable to say that, because the object of the Act of 1876 is different from the object of the earlier legislation, no inference, drawn from the mode in which the Courts applied the earlier legislation, can be allowed to fetter the language of the Act of 1876 itself. It is common ground that the object of the Act of 1876 was to save expense and curtail prolonged inquiries into the past lives of paupers chargeable to the parish. This was done by creating a statutory residential settlement, widely applicable to persons very differently situated, and cutting across most of the previous categories of acquisition, instead of merely adding one more to them. This was a new departure in settlement law, and there is no reason to suppose that the deserted wife, already made irremovable under certain conditions in 1861, was intended to be excluded from its benefit, while coming within the very words "as would in accordance with the several statutes in that behalf render him irremovable." Indeed, that the contrary was intended may be reasonably inferred from the mere use of the word "deemed." It is not "where any person shall . . . . he

shall acquire a settlement therein," but "he shall be deemed to be settled therein." In other words, without considering whether under existing law he is so settled, it is enacted that, regardless of capacity or incapacity, and of older principles as to settlement, he shall be "deemed" to be settled, "deemed" to be something which otherwise he would not or could not be. An enabling and relieving statute such as this is not to be lightly cut down.

The question before us is not in my opinion decided by authority. In view of the questions asked of the Court, of which it was enough to answer the one as to irremovability only, and in view of the differences in the reports (1), the *Maidstone Case* cannot be treated as deciding that a deserted wife obtains a settlement of her own by sufficient statutory residence. The *Rutherglen Case* (2) certainly does not decide the contrary. The appeal turned on the construction of an Act applicable only to Scotland and passed with reference to a prior law differing in various respects from English law, which was negative and restrictive in form, instead of positive and enabling. The passages cited from the opinions of Lords Halsbury, Brampton, and Lindley in favour of one view may be offset by the passages cited from the opinions of Lords Halsbury, Loreburn, and Macnaghten in the other House of Lords cases (*West Ham Case* (3), *Fulham Case* (4), and *Hackney Case* (5)). Of all it may be and I think should be said that the Act of 1876 does not appear to have been brought to their Lordships' attention in connection with the position of a wife, but that their observations were directed to the matters then in debate, and were not intended to prejudge the present question one way or the other.

I think it best not to treat any of the cases cited in the House of Lords as deciding the present one, but, so far as they indicate their Lordships' opinions on matters cognate to the present case, the preponderance appears to me to be in favour of the construction advanced by the respondents, and that construction has further the weight of the opinion of Manisty J. in the *Maidstone Case* (6), of Field J. in *Reg.* v. *Cookham Union* (7), cited with

(1) 5 Q. B. D. 31; 49 L. J. (M.C.) 25; 41 L. T. 586.
(2) [1902] A. C. 360.
(3) [1905] A. C. 450.
(4) [1907] A. C. 255.
(5) [1912] A. C. 475.
(6) 5 Q. B. D. 31.
(7) 9 Q. B. D. 522.

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approval by Vaughan Williams L.J. in the *Southwark Case* (1), and the opinion of Fletcher Moulton L.J. in the same case. Accordingly I think that the appeal fails.

Appeal dismissed.

Solicitors: *Collins & Co.; Alfred Double & Sons.*

G. A. S.

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[IN THE COURT OF APPEAL.]

ROBERTS *v.* GRAY.

Infant—Contract—Necessaries — Benefit— Consideration received—Executory Contract—Liability.

A contract by an infant for necessaries and for his benefit is binding on him, and cannot be repudiated by him on the ground that it is partly executory.

An infant entered into a contract to go on a tour as a professional billiard player, and this contract was held to be for necessaries and for his benefit. He acted on it to some extent and received some benefits under it. Part of the contract was executory:—

Held, that the contract was binding on him as a whole and that he could not repudiate any part of it.

APPEAL from a decision of Lord Alverstone C.J.

This was an action in which the plaintiff claimed from the defendant, an infant, born March 28, 1891, 6000*l.* damages for breach of a contract to join him in a billiard-playing tour.

On May 12, 1910, an agreement was entered into between John Roberts of the first part, Joseph George Gray of the second part, and Harry William Gray (all described as billiardists) of the third part, whereby it was agreed:—

"1. The said John Roberts shall take the said Joseph George Gray in company with his father the said Harry William Gray and the said Joseph George Gray shall go with the said John Roberts so accompanied on a tour of the world as professional billiardists on the terms and conditions hereinafter contained.

(1) [1906] 2 K. B. 112.

"(A) The term of the said tour shall be for a period of eighteen months from the 2nd day of April 1911.

"(B) The said John Roberts shall pay all hotel and travelling expenses both by sea and land of himself and the said Joseph George Gray and the like hotel and travelling expenses of his father the said Harry William Gray." [Travelling to be first class; accounts to be rendered.]

(C) [provided for keeping accounts and furnishing weekly statements.]

(D) [provided for equal division of all receipts and emoluments.]

(E) [Roberts to be entitled to deduct disbursements in account.]

"(F) It is hereby agreed and understood between the parties hereto that the total hotel and travelling expenses of the said John Roberts and Joseph George Gray shall be paid and borne by each of them equally but that the said John Roberts shall defray the whole of same in the first place and also that of the said Harry William Gray and reimburse himself from the said Joseph George Gray's share of profits all such sums so incurred and expended by him as aforesaid but that in the event of such receipts earnings emoluments and gifts being insufficient to satisfy such expenditure neither of them the said Joseph George Gray or Harry William Gray shall be personally liable or responsible therefor.

"(G) The tour to be under the sole control and management of the said John Roberts.

"2. Nothing herein contained shall create or be deemed to create a partnership between the parties hereto and the said John Roberts shall save as aforesaid be solely liable for all payments and shall be solely responsible for all losses (if any) from the date hereof until the 1st day of October 1912.

"3. The parties hereto shall where same are available play exclusively on billiard tables the manufacture of Alcock & Company Proprietary Limited."

The plaintiff alleged that under the contract he expended much time and trouble and incurred liabilities in making arrangements for billiard matches and had suffered damage in consequence of the defendant's breach of the agreement. The plaintiff returned to England in March, 1911, and in April made various payments

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to the Grays for their expenses. Disputes arose about the kind of billiard balls to be used, and on April 20, 1911, the defendant J. G. Gray repudiated the contract. The plaintiff brought this action in May, 1911, and J. G. Gray counterclaimed rescission of the contract.

The action was tried in February, 1912, before the Lord Chief Justice and a special jury, when the jury found a verdict for the plaintiff on the questions left to them, namely, whether there was a false representation by the plaintiff; whether the defendant was thus induced to enter into the contract; and whether the plaintiff was ready and willing to carry out the contract. They assessed the damages at 1590*l.* The question whether the contract was beneficial to the infant was left to the Lord Chief Justice, who decided in favour of the plaintiff. J. G. Gray appealed.

J. B. Matthews, for the appellant. This contract is not binding upon the appellant. In very early times though an infant could under certain circumstances enter into a contract he could disaffirm the transaction when he came of age: Year Book 18 Edw. IV., Pasch. fol. 7. See Holdsworth's History of English Law, vol. iii., p. 402. The first passage in which the modern doctrine is stated occurs in *Whittingham* v. *Hill.* (1) Even if an agreement entered into by an infant be profitable for him, unless it is strictly for his necessity, namely, diet and apparel or necessary learning, it can be avoided by him on coming of age, or within age. In *Gylbert* v. *Fletcher* (2) it was held that the covenant of an infant for his apprenticeship could not bind him: *Rex* v. *The Inhabitants of Laindon.* (3) In *Holt* v. *Ward Clarencieux* (4) a contract to marry at a future date by an infant with a person of full age was held not void but only voidable at the election of the infant: *Rex* v. *The Inhabitants of Chillesford* (5); *Carter* v. *Silber.* (6) In *Brooke* v. *Gally* (7) Lord Hardwicke said: "The law lays infants under a disability of contracting debts, except for bare necessaries, and even

(1) (1619) Cro. Jac. 494.
(2) (1629) 4 Cro. Car. 179.
(3) (1799) 8 T. R. 379, 384.
(4) (1732) 2 Str. 938.
(5) (1825) 4 B. & C. 94, 100.
(6) [1892] 2 Ch. 278.
(7) (1740) 2 Atk. 34.

this exemption is merely to prevent them from perishing." In *Harvey* v. *Ashley* (1) Lord Hardwicke again said: "It is very true in law this difference is taken, that where an agreement appears upon the face of it to be prejudicial to an infant, it is void, but if for his advantage, then voidable only." See also *Keane* v. *Boycott* (2); *Flower* v. *London and North Western Ry. Co.* (3); *Stephens* v. *Dudbridge Ironworks Co.* (4); and *Bruce* v. *Warwick* (5), where it was held that the trading contract of an infant is not void, but he may enforce it at his election: *Corn* v. *Matthews.* (6) An infant partner is not liable for trade debts: *Lovell & Christmas* v. *Beauchamp.* (7) "An infant may bind himself to pay for necessaries, but if he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him": Co. Litt., s. 259.

The doctrine has always been invoked in favour of the infant, not against him: Shepp. Touch., 8th ed., p. 56 In *Holmes* v. *Blogg* (8) Park J. said: "In all the cases, it has been allowed to infants at full age, to affirm or disaffirm contracts made by them during infancy." In *Newry and Enniskillen Ry. Co.* v. *Coombe* (9) Parke B. said: "It is true that the statute contemplates the case of infants being shareholders, and no doubt they may acquire shares by descent or marriage; but the question here is, whether, when an infant has become a shareholder by contract, he may not disaffirm it. I am of opinion that this is the ordinary case of a contract with the company, which the defendant may disaffirm."

In *Ex parte Taylor* (10) Turner L.J. said: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back."

(1) (1748) 3 Atk. 607, 610.
(2) (1795) 2 H. Bl. 511.
(3) [1894] 2 Q. B. 65.
(4) [1904] 2 K. B. 225.
(5) (1815) 6 Taunt. 118.
(6) [1893] 1 Q. B. 310.
(7) [1894] A. C. 607.
(8) (1817) 8 Taunt. 35, 41.
(9) (1849) 3 Ex. 565, at p. 574.
(10) (1856) 8 D. M. & G. 254.

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The general law is stated by Willes J. in *Ryder* v. *Wombwell* (1) as follows: "The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessaries." See also *Martin* v. *Gale* (2), where Jessel M.R. expresses a doubt as to the statement that the rule had been laid down by Lord Mansfield and Lord Hardwicke that "if an agreement be for the benefit of an infant at the time it shall bind him."

Lord Mansfield himself deals with the question in *Earl of Buckinghamshire* v. *Drury*. (3) By the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1, certain contracts are made void which before were voidable only. See also *Ex parte Jones* (4) and *Smith* v. *Lucas* (5), where Jessel M.R. states the law upon this point.

Benefit or no benefit is by no means the test of voidability of an infant's contract: *Fellows* v. *Wood* (6), which was explained by Chitty J. in *De Francesco* v. *Barnum*. (7)

[COZENS-HARDY M.R. referred to *Leslie* v. *Fitzpatrick*. (8)]

Labour contracts have been held to be within the class of contracts for necessaries.

In *De Francesco* v. *Barnum* (9) Fry L.J., sitting as a judge of first instance, says that from a very early date it has been held that one exception as to the incapacity of an infant to bind himself relates to a contract for his good teaching or instruction whereby he may profit himself afterwards. But the Court will look at the whole contract having regard to the circumstances of the case and determine whether it is or is not beneficial, and if not the infant will not be bound. The same rule applies to marriage settlements by infants: *Seaton* v. *Seaton* (10); *Cooper* v. *Cooper*. (11) An infant is not necessarily liable on a contract merely because it is for his benefit: *Cowern* v. *Nield*. (12)

(1) (1868) L. R. 4 Ex. 32, 38.
(2) (1876) 4 Ch. D. 428, at p. 431.
(3) (1761) 2 Eden, 60, 72.
(4) (1881) 18 Ch. D. 109, 119.
(5) (1881) 18 Ch. D. 531, 543.
(6) (1888) 59 L. T. (N.S.) 513.
(7) (1889) 43 Ch. D. 165, 174.
(8) (1877) 3 Q. B. D. 229.
(9) (1890) 45 Ch. D. 430, 439.
(10) (1888) 13 App. Cas. 61.
(11) (1888) 13 App. Cas. 88.
(12) [1912] 2 K. B. 419, 422.

Although a contract by an infant with reference to necessaries, including instruction and education, may be binding on him in so far as the consideration has been executed, yet, except in the case of apprenticeship or service, in so far as it is executory the contract cannot be enforced against him. No doubt an infant may be liable on a contract so far as it has been executed: *Walter* v. *Everard* (1); *Clements* v. *London and North Western Ry. Co.* (2); but an executory contract is never enforced against an infant. If he has agreed to pay a definite sum for instruction and has received the instruction he must pay the sum, but the part of the contract which is executory will not be enforced. There is no agreement here for payment of a fixed sum; there is no contract for necessaries nor anything beneficial to the infant; and this is not a contract of apprenticeship nor of service.

Tindal Atkinson, K.C., and *C. E. Dyer*, for the plaintiff, were not called upon.

COZENS-HARDY M.R. This appeal has been very ably argued by Mr. Matthews, but, having listened to everything he has urged upon us, I see no reason to differ from the view taken by the Lord Chief Justice. We have had our attention called to a great number of cases dealing with the circumstances under which and the extent to which an infant may be bound by, and be incapable of repudiating, a contract made by him during infancy. Far be it from me to say there has not been some development of this law since the age when the earliest cases which have been cited were decided, but it is important to remember that as early as Lord Coke—Co. Litt. 172 A—it has been held that an infant's contract for necessaries is binding, and it was laid down by him that that doctrine also applied not merely to bread and cheese and clothes, but to education and instruction. That has been construed by this Court in the case of *Walter* v. *Everard* (1) in a very wide sense. Fry L.J. in that case pointed out that education must not be taken in its narrow technical sense as merely meaning education to enable a man by the work of his hands to hereafter maintain himself as an artisan, but has

(1) [1891] 2 Q. B. 369. (2) [1894] 2 Q. B. 482.

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a much wider meaning than that; it applies to education and instruction in the social state in which the infant is, and in which he may expect to find himself when he becomes an adult.

Now, what is the effect of a contract which is entered into by an infant with reference to necessaries, including instruction and education? We have heard an argument forcibly put before us that such a contract may be good so far as the consideration has been executed, but that it cannot be enforced so far as it is executory. For that proposition I think there is no authority, and I certainly think that it is not open to this Court to say that there is any such rule. We are bound by *Clements* v. *London and North Western Ry. Co.* (1) There the contract was a contract of service by an infant. A term of the service was that he should become a member of a society for the employees of the London and North Western Railway Company, and, in consideration of certain benefits, he was not to bring any action against the company in case of accidents whether due to the company's negligence or not. The Court considered the contract as a whole. It is quite idle to say "look at the contract and see if there is one clause which is adverse to the infant." The Court cannot consider whether that is for the infant's benefit and, if it is not, say that the whole contract is therefore void; it must look at the contract as a whole and see whether, looking at it as a whole, it is a contract for the infant's benefit, not merely a contract for necessaries, but if it is a contract which is on the whole for the infant's benefit. If so, what is the result? Lord Esher says if upon consideration of the whole of the contract there is a manifest advantage to the infant he cannot avoid it. (2) Then Kay L.J. says (3): "I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract." A. L. Smith L.J., quoting with approval the passage in the judgment of Fry L.J., sitting, not in the Court of Appeal, but as a judge of the Chancery Division, in *De Francesco* v. *Barnum* (4) says (5): "There is

(1) [1894] 2 Q. B. 482.
(2) [1894] 2 Q. B. 490.
(3) [1894] 2 Q. B. 492.
(4) 45 Ch. D. 430.
(5) [1894] 2 Q. B. 495.

another exception which is based on the desirableness of infants employing themselves in labour, therefore, when you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be prima facie binding upon an infant. I take this to be good law. Prima facie, therefore, this contract is binding on the infant." If, therefore, this is a contract falling within a class to which the doctrine of necessaries applies, and if, taken as a whole, it is for the infant's benefit, I see no foundation whatever for the argument that the infant is not liable for damages in the event of his repudiating or declining to perform the contract entered into. The Court has acted upon that in *Gadd* v. *Thompson* (1) to the extent of granting an injunction to restrain an infant from being guilty of a breach of a clause in a contract of service after he has left the employment. Here only damages are claimed and have been given.

It only remains, therefore, to consider that which I think is not really a very difficult problem. What is the nature of this contract? What was the station of the parties and what is the meaning of the agreement?

[His Lordship went through the contract, and was clearly of opinion that playing billiards in company with a noted player like John Roberts must be instruction of the most valuable kind for an infant who desired to make playing billiards the occupation of his life; and agreed with the Lord Chief Justice that the agreement was in effect for teaching, instruction and employment, and was reasonable and for the benefit of the infant.]

That being so, the Lord Chief Justice gave judgment for the plaintiff against the infant, and in my opinion the judgment which he gave was perfectly right and cannot be interfered with.

This appeal must be dismissed with costs.

FARWELL L.J. I am of the same opinion. The chief point in Mr. Matthews' argument does not, in my opinion, really arise. He has sought to convince us that assuming this contract was not a contract for necessaries it would be voidable by the infant.

(1) [1911] 1 K. B. 304.

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It is unnecessary to express any opinion on the point which Kay L.J. dealt with in the case of *Clements* v. *London and North Western Ry. Co.* (1) The question to what extent that rule applies does not arise. This is clearly a contract for necessaries within the meaning which that phrase has had attached to it in the course of many centuries since Lord Coke wrote. It is in effect for board, lodging, travelling and employment all found at the plaintiff's expense for the infant and involved in the employment, and the education which a billiard player of receptive capacity could not fail to obtain from playing continually month after month with a great billiard player like John Roberts. Every item which goes to make up necessaries in the sense of a labour and education contract, except the express term to give the education, which would be necessary if it were an apprenticeship deed, is in this particular contract as much so as though, instead of finding the board and lodging on board ship and in various hotels, Roberts had found it in a house of his own where he gave exhibitions. I cannot doubt that this is a contract for necessaries.

Then the next thing is, is it for the benefit of the infant, because, although a contract for necessaries is prima facie binding, it may be shewn to contain terms so harsh as not to be binding on the infant. In my opinion, it is clearly for the benefit of the infant, and I see nothing to suggest that it is in the least harsh upon him.

Then the only point which remains is, is it not, notwithstanding that, voidable by the infant? It appears to me that is answered in an obiter dictum of Lord Abinger's in *Wood* v. *Fenwick*. (2) Lord Abinger says: "There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him." To which counsel interjects: "At all events, he may determine it at any time by notice." Then Lord Abinger says: "That would be a contradiction in terms: because, to say that he may contract, is to say that he may bind himself by the contract; how then can it be determined at his election the next day?" That is adopted by the decision of Lord Esher and the other Lords Justices in *Clements* v. *London and North Western*

(1) [1894] 2 Q. B. 494. (2) (1842) 10 M. & W. 195, 204.

Ry. Co. (1), and it would render the rule futile if we were to say that although the contract is for necessaries and although it is for his benefit he can yet repudiate it if he thinks fit. In my opinion he cannot do so; the judgment was quite right; and this appeal fails.

HAMILTON L.J. I entirely agree. The first question is whether this was a contract for necessaries, or, in the words of Lord Coke,—Co. Litt. 172 A—whether it was a contract for the infant's "good teaching or instruction whereby he may profit himself afterwards." I think it is quite clear, as a matter of law, that this contract as framed was capable of being, and was rightly held to be, such a contract for necessaries. The circumstances that it is not expressed as a contract for employment; that the consideration for that which has to be done by the infant does not take the form of wages; and that he is not placed in such a relation to the plaintiff as would make him a servant, appear to me to be far from conclusive of the matter. Whether the contract is one for necessaries in this sense must depend upon its substance and not upon its form, and there was abundance of evidence here upon which it could be found by the learned Lord Chief Justice, who was, by agreement, the tribunal of fact, so far as the facts were involved, as well as of the law on this point, that a part and a most important part of this contract was the instruction that would be received by the defendant from playing constantly with the plaintiff, and also from playing under the conditions of a world-wide tour, a thing which a distinguished billiard player apparently contemplates as part of his career. It seems to me to be clear, therefore, upon the first question, that this contract is one for necessaries, and, in so far as the antithesis framed in *Cowern* v. *Nield* (2) by the Divisional Court is presented to us, I entertain no doubt that this is not such a contract as could be called a trading contract and is amply within the other side of the antithesis as stated by Phillimore J., namely, contracts relating to infant persons such as contracts for necessaries, of which he there mentions various kinds.

If this is a contract for necessaries, is there anything about it

(1) [1894] 2 Q. B. 482. (2) [1912] 2 K. B. 419.

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to prevent it being binding upon the infant? For this purpose it is necessary to consider whether it contains unusual and harsh and burdensome terms such as would prevent it from being a contract enforceable against the infant. The Lord Chief Justice, being again a tribunal both of fact and law, decided that there were no terms in this contract that would have that effect, and no reason has been suggested to us for differing from him upon this point.

There remains only one further argument, and that goes not to the nature of the contract, but to the form of the action. This contract was repudiated by the infant, the defendant, at an early stage, though not before some portion of the services contemplated by the plaintiff had been rendered by him, and was to a large extent an executory contract so that the remedy takes the form of a claim for damages. It is therefore suggested that the contract is not enforceable against the infant, although had he taken the benefit of the plaintiff's instruction he might then have been compellable to pay a quantum meruit for services received. I am unable to appreciate why a contract which is in itself binding, because it is a contract for necessaries not qualified by unreasonable terms, can cease to be binding merely because it is still executory. To my mind, it is the character of the contract, namely, a contract for necessaries in the wide sense of the term, and not the form of the remedy for its breach which the particular accidents of the case may give rise to, that must determine whether it is a contract that is binding on the infant or is only voidable at his option. If the contract is binding at all, it must be binding for all such remedies as are appropriate to the breach of it. Although no doubt the exception is introduced, not for the benefit of the tradesman, but for the benefit of the infant himself, when the circumstances of the contract are such as to bind the infant, he must in common justice be liable to a judgment for any form of remedy which his breach of contract has made it necessary for the plaintiff to seek.

I agree this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *L. Stroud; Letts Brothers.*

H. C. R.

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Sale of Goods — C.i.f. Contract — Delivery — Safe Arrival of Goods at Destination — Non-insurance of the Goods — Obligation of Buyer to accept—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 28.

When goods are sold under a c.i.f. contract but the seller does not effect an insurance upon them for the transit, they are not delivered in accordance with the contract although they arrive safely at their destination, and the buyer is not bound to accept them or to pay the price.

Appeal from the Mayor's Court.

The plaintiffs contracted with the defendants for the sale to the defendants of twenty cases of French walnuts, c.i.f. to Hull, for 40*l.* 5*s.*, payment to be made thirty days after delivery.

The goods were shipped by the plaintiffs at Bordeaux for Hull, and they sent to the defendants a bill of lading and an invoice: but no insurance of the goods from Bordeaux to Hull was ever effected. The goods arrived safely at Hull, but the defendants refused to accept them.

The plaintiffs sued the defendants to recover the contract price as for goods sold and delivered; and the defendants set up the defence that, no insurance of the goods having been effected, they had not been delivered in accordance with the contract. The learned Common Serjeant at the trial left the case to the jury, who found a verdict for the plaintiffs, and judgment was entered for them accordingly.

The defendants appealed.

Roche, K.C., and *J. R. E. Cunliffe*, for the appellants. This is in substance an action for the price of goods sold and delivered. By the contract the price is not payable until thirty days after delivery. There is no complete delivery until the goods have been put on board the vessel and a bill of lading, invoice, and policy of insurance have been delivered to the buyers. It is now well-settled law that that is the meaning of a c.i.f. contract:

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Biddell Brothers v. *Clemens Horst Co.* (1) [They referred to *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works Bindschedler.* (2)]

A. Powell, K.C., and *J. P. Oliver*, for the respondents. In the case of a c.i.f. contract the seller, before he can demand payment, must either ship the goods and forward the proper documents to the buyer, or he must ship the goods and wait until they have arrived safely at their destination and can be delivered there to the buyer. If the goods have arrived safely at their destination, the seller need not produce a policy of insurance; no good purpose could be served by handing over a piece of waste-paper such as a policy after the safe arrival of the goods. In *Biddell Brothers* v. *Clemens Horst Co.* (3), in the House of Lords, the dissenting judgment of Kennedy L.J. in the Court of Appeal was approved and adopted. In his judgment (4) Kennedy L.J. said that a tender of goods afloat under a c.i.f. contract is to be made "by tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance"; and also that "delivery of the goods is constructively tendered to him by the tender of the bill of lading . . . . accompanied in case of loss by the policy of insurance." (5) In *Hickox* v. *Adams* (6) the policy of insurance was only against total loss and therefore insufficient to satisfy the terms of the contract.

Roche, K.C., in reply. In *Biddell Brothers* v. *Clemens Horst Co.* (1) Hamilton J. stated the law to be that the seller is bound "to arrange an insurance upon the terms current in the trade which will be available for the benefit of the buyer"; and in *Landauer & Co.* v. *Craven & Speeding Brothers* (7) Scrutton J., referring to the passage from the judgment of Kennedy L.J. which has been quoted, said: "I am unable to follow this obiter dictum. At time of tender the goods are generally at sea, and nobody on land knows whether they are afloat or at the bottom, and in my view the buyer is entitled to require the policy in his shipping documents, whether it is known that there has been a

(1) [1911] 1 K. B. 214, 220.
(2) [1898] A. C. 200.
(3) [1912] A. C. 18.
(4) [1911] 1 K. B. 934, 956.
(5) Ibid. at p. 958.
(6) (1876) 34 L. T. 404.
(7) [1912] 2 K. B. 94, 107.

loss or not." The decision in *Hickox* v. *Adams* (1) shews clearly that in order to perform his contract the seller must effect a separate policy upon the goods for the transit. [He referred to *Yuill & Co.* v. *Scott Robson.* (2)]

LUSH J. This action in the Mayor's Court was, in substance, brought for the price of goods sold and delivered. The plaint was in the form, familiar in the Mayor's Court, known as concessit solvere, so that it would have been open to the plaintiffs to rely upon the fact either that goods had been sold and delivered, or had been bargained and sold, and that the property passed. It is immaterial which, for under the contract the buyers were only to pay thirty days after delivery, and it was therefore essential for the sellers to prove delivery in order to succeed in their action.

The contract was for the sale of twenty cases of French walnuts c.i.f. Hull, upon the terms that the price was to be paid thirty days after delivery. The plaintiffs accordingly had to prove that the goods were delivered in accordance with that contract. The goods were put on board ship and an invoice and bill of lading were sent to the buyers, but the plaintiffs not only did not tender a policy of insurance with the shipping documents, but had not even at any time effected an insurance upon these goods for the voyage to Hull. The goods arrived safely at Hull. The plaintiffs insisted that all the conditions had been fulfilled and that the time for payment had arrived. The defendants, on the other hand, for various reasons refused to pay. This action was commenced, and the defendants raised the defence that the plaintiffs could not succeed because they could not prove that the goods had ever been delivered.

At the trial the plaintiffs failed to prove that any policy of insurance had been tendered or in fact had been effected. The defendants called no evidence, but contended that the buyers had a right to have the goods insured to their destination, and that unless the vendors had insured them the necessary evidence of delivery had not been given. The learned Common Serjeant left the question generally to the jury, who found a verdict for the

(1) 34 L. T. 404. (2) [1907] 1 K. B. 685.

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plaintiffs. The case now comes before us on an appeal by the defendants.

For the appellants it is contended that the obligation of the vendors under a c.i.f. contract such as this is to effect a complete delivery of the goods and that the delivery is not complete unless with the shipping documents a policy of insurance is tendered to the buyers, and that in any case, whether the policy is actually tendered or not, it is essential in order to constitute delivery of the goods that the vendors should have effected a proper policy of insurance for the transit of the goods; and counsel has pointed out that the price which the buyers agree to pay under the contract includes the necessary premium which the vendors have to pay for the insurance. That is the appellants' contention, and they say that, inasmuch as there was no delivery in these circumstances, the plaintiffs must necessarily fail in the action.

Counsel for the respondents, on the other hand, says that contention is wrong. It may well be, he says, that the vendors are under an obligation to tender a policy of insurance in case of loss of or damage to the goods, and that their proper course is to insure; but that, if the buyers do not ask for a policy and the goods arrive safely, then the fact that there never has been an insurance becomes irrelevant and immaterial, and in that event the vendors are entitled to sue for the price although they never had effected the policy of insurance which it was their duty to effect under the contract. He contends that the property passed and the goods were tendered and that all that has happened is that there was an obligation on the vendors to insure which was not fulfilled, but that the non-fulfilment did not affect the transfer of the property or the tender of the goods.

Several cases have been cited, and after carefully considering them I have come to the conclusion that the appellants' contention is well founded and that the plaintiffs have not discharged the burden which lay upon them of proving the complete delivery of the goods which was essential to their success in the action. Now, we are not without guidance as to what is necessary to complete delivery under a contract of this kind. It seems to me that this question has really been decided in the

recent case of *Biddell Brothers* v. *Clemens Horst Co.* (1) In that case Hamilton J. states the obligations which are upon the seller under a contract of this kind, and among them is this, "to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer" (2); and the learned judge goes on: "Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." (2) There, as it seems to me, Hamilton J. treats the tender of the policy of insurance as one of the essential conditions which must be fulfilled before delivery has been given. In that case in the Court of Appeal Kennedy L.J. delivered a dissenting judgment which was subsequently approved and acted upon in the House of Lords. There are two passages in that judgment which at first sight may seem to give some colour to the contention of the respondents, because the Lord Justice, discussing the question of tender, said (3): "How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance"; and further on he used similar, though not identical, language, when he said (4): "If it be the duty implied in the c.i.f. contract, as held by Brett L.J. in that case (*Sanders* v. *Maclean* (5)), that the vendor shall make every reasonable exertion to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee, it is, I venture to think, 'mercantilely reasonable' that the purchaser should be held bound to make the agreed payment when delivery of the goods is constructively tendered to him by the tender of the bill of lading . . . . and accompanied in case of loss by the policy of insurance." It is said that that shews that the Lord Justice did not treat the tender

(1) [1911] 1 K. B. 214, 934; [1912] A. C. 18.
(2) [1911] 1 K. B. at p. 220.
(3) [1911] 1 K. B. 934, 956.
(4) Ibid. at p. 958.
(5) (1883) 11 Q. B. D. 327, 343.

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of the policy of insurance at the time of shipment as essential to a complete delivery of the goods, but on the contrary treated the bill of lading as the index of transfer and said that it was sufficient if the policy was tendered in case of loss of the goods. I think, however, that Kennedy L.J. was not dealing at all with the question which we have now to consider when he used that language; and certainly nothing that he said would cover a case like this where not only has no policy been tendered but no policy at all has been effected. In my opinion, therefore, those two passages in the judgment of Kennedy L.J. do not help the respondents to get over the difficulty pointed out by the appellants. If it is an essential condition of delivery that the goods shall be insured in favour of the buyer so that he shall be in a position to dispose of the goods with all the shipping documents which are necessary to give him a title and secure him against loss, then, apart from the question whether the policy must be tendered to him, it seems to me to be quite clear that, that condition not having been fulfilled, the plaintiffs when they brought this action were not in a position to prove that they had delivered the goods to the defendants.

With regard to the further question whether the policy of insurance ought to be tendered to the buyer I think that, in the absence of waiver, it is an essential condition of delivery under a c.i.f. contract that among the shipping documents tendered to the buyer the policy of insurance shall be included as an essential item. It is one of the documents which must be transferred to the buyer in order to effect a complete delivery to him of the goods under a c.i.f. contract.

I am, therefore, of opinion that there was no evidence on which the jury could find that the plaintiffs had performed, or were ready and willing to perform, their part of the contract. That being so, the verdict and judgment must be set aside and judgment entered for the defendants.

ROWLATT J. I am of the same opinion. I cannot doubt that ordinarily it is the duty of the vendor under a c.i.f. contract to deliver not only a bill of lading but also a policy of insurance. The respondents contend that the goods arrived safely and that,

therefore, there was no longer any occasion to deliver a policy, and reference was made to the two passages in the judgment of Kennedy L.J. in *Biddell Brothers* v. *Clemens Horst Co.* (1) which have been read by Lush J. It is argued that they mean that the policy of insurance need only be tendered if the goods have been lost in transit. But that in many cases could not be known during the transit. I think that Kennedy L.J. meant "accompanied in case the goods should be or should have been lost in transit" and was not referring to an ascertained past fact, but to a present risk, when he used the words "in case of loss." I cannot, therefore, accept those two passages as going the whole length of the respondents' contention. If one takes a business view of the matter, I think that it is reasonably clear. What is meant by saying that the goods have "arrived"? To the buyer it means only that the ship has arrived which he is told contains the goods. The bill of lading must be given to him and, further than that, he is entitled to say that he will not pay the price unless a policy of insurance is handed to him along with it so that if anything has gone wrong with the goods he may acquire his rights under the policy in lieu of the goods themselves. Even if it could be made out that he had waived the actual tender of a policy, that alone would not help the seller. What has to be shewn is that he waived the insurance itself. It is impossible to hold that he is to be called upon to pay for goods which have been shipped uninsured.

In this case it was not proved that there was any policy of insurance upon these goods to Hull, and, therefore, I agree that judgment must be entered for the defendants.

Appeal allowed.

Solicitors for appellants: *Ince, Colt, Ince & Roscoe, for A. M. Jackson, Hull.*

Solicitors for respondents: *Horace Mayhew & Darling.*

(1) [1911] 1 K. B. 934, 956, 958.

J. H. W.

1913
Feb. 4, 7.

INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT.

Ship—Bill of Lading—Exemptions from Liability—Fire—Actual Fault or Privity—Perils of Sea—Dangerous Cargo—Insufficient Stowage—Sodium—Warranty of Seaworthiness—Maintenance of Vessel's Class—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship is not liable to make good any loss or damage happening without his actual default or privity where any goods, merchandise, or other things taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

The plaintiffs shipped on the defendants' vessel certain goods for carriage from Le Tréport to London on the terms of a bill of lading which contained the following exemptions from liability:—

(1.) "Fire on board . . . . and all accidents, loss, and damage whatsoever from . . . . perils of the seas . . . . or from any act, neglect, or default whatsoever of the master, officers, crew, stevedores, servants, or agents of the owners . . . . in the management, loading, stowing . . . . or otherwise . . . ."

(11.) "It is agreed that the maintenance by the shipowners of the vessel's class . . . . shall be considered a fulfilment of every duty, warranty, or obligation whether before or after the commencement of the said voyage."

The defendants also took on board at Le Tréport certain cases of metallic sodium saturated with petrol. The sodium was insufficiently packed and stowed with insufficient care. The vessel started in rough weather; the cases broke loose, and coming into contact with water caused a series of explosions and fire on board, as the result of which the ship went down and the plaintiffs' goods were lost:—

Held, (1.) that the goods were lost by reason of fire within the meaning of s. 502 of the Merchant Shipping Act, 1894.

(2.) That the operation of that section was excluded by the terms of the exemptions from liability.

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. 229, followed.

(3.) That the exemptions in clause 1 only relieved the defendants provided the ship was seaworthy at the commencement of the voyage.

The Glenfruin (1885) 10 P. D. 103, followed.

(4.) That the ship was not seaworthy at the commencement of the voyage owing to bad stowage endangering her safety.

Kopitoff v. *Wilson* (1876) 1 Q. B. D. 377, followed.

(5.) That clause 11 did not exempt the defendants from liability

for unseaworthiness, as it was too vague and uncertain for that purpose.

Nelson Line (*Liverpool*) v. *James Nelson & Sons* [1908] A. C. 16, followed.

Held, consequently, that the defendants were liable for the loss of the plaintiffs' goods.

TRIAL of action before Scrutton J. without a jury.

The plaintiffs claimed damages for the loss of certain cases of mineral waters shipped on the defendants' steamship, the *Hardy*, for carriage from Le Tréport to London.

The facts are stated at length in the written judgment of Scrutton J. The following brief statement will serve to indicate the points argued.

The defendants at Le Tréport took on board the *Hardy* and stowed on her main hatch twenty cases of metallic sodium. In point of fact the sodium was insufficiently packed and insecurely stowed having regard to its dangerous character if exposed to water. The *Hardy* started in rough weather; the sodium got displaced from the hatch and, coming in contact with sea water, caused a series of explosions and fire on board, as the result of which the ship went down with the plaintiffs' goods.

The defendants relied, first, upon s. 502 of the Merchant Shipping Act, 1894 (1); secondly, upon the exceptions from liability contained in the following clauses in the bill of lading on the terms of which the goods were shipped:—

(1.) "Fire on board . . . . and all accidents, loss, and damage whatsoever from defects in hull, tackle, apparatus . . . . or from perils of the seas . . . . or from any act, neglect, or default whatsoever of the master, officers, crew, stevedores, servants, or agents of the owners . . . . ashore or afloat in the management, loading, stowing, discharging, or navigation of the ship or otherwise, the owners . . . . being in no way liable for any consequences of the causes before mentioned."

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual default or privity in the following cases; namely,—

"(i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . ."

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(11.) "It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative, failing a class, the exercise by the shipowners . . . . or their agents of reasonable care and diligence in connection with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty, or obligation and whether before or after the commencement of the said voyage."

Leck, K.C., and *Raeburn*, for the plaintiffs. The defendants are liable unless they can excuse themselves. They rely first on s. 502 of the Merchant Shipping Act, 1894; but that section will not avail them, first, because they were directly responsible for the insufficient stowage of the sodium: *Master and Owners of s.s. City of Lincoln* v. *Smith* (1); *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (2); secondly, because the operation of the section is impliedly excluded by the exceptions in s. 1 of the bill of lading: *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (3)

Secondly, they rely on those exceptions, but they have no effect unless the vessel is seaworthy: *The Glenfruin* (4); *Seville Sulphur and Copper Co.* v. *Colvils, Lowden & Co.* (5) The *Hardy* was not seaworthy: *Kopitoff* v. *Wilson.* (6)

Dawson Miller, K.C., and *Mackinnon*, for the defendants. The defendants are protected by s. 502 of the Merchant Shipping Act, 1894. The loss occurred "by reason of fire" within the meaning of that section, and upon the facts no default is to be imputed to the owners. They stated their requirements as to the packing. It was not their fault if those requirements were not complied with.

It is a question of the intention of the parties to be inferred from the language of the exceptions whether the exceptions in a bill of lading exclude the operation of the statute. There is nothing in this bill of lading to shew any such intention. But be that as it may, the defendants are also protected by clause 1 of the exceptions, which saves them from liability for loss from

(1) [1904] A. C. 250.
(2) (1912) 18 Com. Cas. 23.
(3) [1912] 1 K. B. 229.
(4) 10 P. D. 103.
(5) (1888) 15 R. 616.
(6) 1 Q. B. D. 377.

fire on board and from perils of the seas. The loss was due to one or the other, if not to both, of these causes: *Hamilton* v. *Pandorf.* (1) The *Hardy* was not unseaworthy; the defect in stowage, if any, could easily have been remedied during the voyage: *Hedley* v. *Pinkney & Sons Steamship Co.* (2) But even if the vessel was unseaworthy the defendants have by clause 11 of the exemptions protected themselves from liability for unseaworthiness.

[SCRUTTON J. Would that clause excuse the shipowners if they refused to deliver the cargo? If not, what limits its operation?]

At the least it exonerates and discharges the shipowner from the implied warranty of seaworthiness.

Leck, K.C., in reply. A shipowner who would protect himself from liability for unseaworthiness must do so in clear and unambiguous terms. Clause 11 is too vague to effect this object: *Nelson Line (Liverpool)* v. *James Nelson & Sons.* (3)

Cur. adv. vult.

Feb. 7. SCRUTTON J. read the following judgment:—In this case Messrs. Ingram & Royle, Limited, sued the Services Maritimes du Tréport, Limited, the owners of the steamship *Hardy*, for the loss of certain mineral water on board the *Hardy* when she sank in the English Channel. They also alleged that the *Hardy* was unseaworthy on sailing, by reason of a large quantity of metallic sodium stowed on her main hatch, which if wetted was liable to explode, and which in fact sank the ship. The defendants replied that the steamer was lost by fire, from liability for which they were protected under s. 502 of the Merchant Shipping Act, 1894, or that if lost by fire, or perils of the seas, or negligence of their servants in stowage, or even unseaworthiness, they were not liable for such a loss under the terms of their bill of lading.

The facts are as follows. The owners of the sodium sent to Messrs. John Harrison, Limited, who were managing the *Hardy* for her owners, an inquiry for a freight quotation, to which Mr.

(1) (1887) 12 App. Cas. 518. (2) [1894] A. C. 222.
(3) [1908] A. C. 16.

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Lindley, a director of John Harrison, Limited, and of the defendant company, replied: "Replying to your favour of the 14th inst., we have pleasure in quoting under rates sodium. In iron drums, hermetically sealed, packed in strong wooden cases, on deck at owners' risk from Tréport," with certain quotations for one ton and five ton lots. Mr. Lindley did not know much about sodium, but turned up the English railway classification, and inserted its requirements as to packing, to which he adhered after a further letter. About two tons of sodium were accordingly forwarded to Le Tréport for shipment in twenty cases, roughly 36 inches by 20 inches by 16 inches. Each case contained 100 kilogrammes of sodium in a metal case one-fiftieth of an inch thick, surrounded by a wooden case. They were labelled in French "Beware of damp." They were stowed on the *Hardy* on deck on a tarpaulin on the main hatch, in two rows of ten cases, each row fore and aft. The tarpaulin was turned over them, another tarpaulin put on the top, and the whole bundle lashed round and across with ropes fastened to ring bolts in the hatch.

The *Hardy* started on her voyage to England in the ordinary rough weather of the English Channel. In half an hour after leaving port a heavy sea came on board and knocked some of the cases of sodium off the hatch. The salt water got at the sodium and a series of explosions followed. The hatch was broken in and the hold set on fire. The poop and sides of the ship were broken and strained, and began to leak, and the ship began to settle by the head. Some sodium falling down the fiddleys caused a fire in the engine-room. The crew were driven into the boats by the flames, and shortly afterwards a very heavy explosion in the hold broke the ship in two and she sank. The plaintiffs' goods, cases of Vichy water, were in the burning hold, and it is doubtful whether they had been destroyed by fire or not when the ship went down through the incursion of sea water.

Sodium when in contact with water combines with the oxygen of the water, making a very fierce heat and liberating the hydrogen of the water. If the sodium is unable to move on the water and cool itself, fiercer heat is developed, and the hydrogen may be lighted, and if mixed with air may explode. Further, this sodium

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was saturated with petrol; the heat developed by contact of sodium with water would vaporize the petrol, which supplied another explosive mixture. This amply accounts for the explosions and flames, and if there was any risk of the sodium coming into contact with water, the ship was obviously in a position of great danger.

I find that the sodium was shipped in cases insufficiently strong for the voyage, and was stowed with insufficient care and security having regard to its dangerous character if water came in contact with it. The ship's officers did not know the dangerous character of sodium; if they had they could have taken more precautions in stowage. Mr. Lindley knew there was some danger, though not its exact nature; he did not know about the petrol; and the sodium was not shipped, as he stipulated, in "iron drums," as they are ordinarily understood in commerce.

I further find that within the meaning of the authorities, especially *Hamilton* v. *Pandorf* (1), the plaintiffs' goods were lost either by perils of the sea, the entry of water causing the ship and goods to sink, or by fire; and that if they had not been destroyed by one they would have been destroyed by the other. The cause of the fire, or of the entry of sea water, was the sodium coming into contact with sea water; and the cause of this again was a peril of the sea, a wave breaking over the ship acting on goods insufficiently packed and insecurely stowed.

I have considered whether this ship was unseaworthy on starting on her voyage. Bad stowage, which endangers the safety of the ship and cannot readily be cured on the voyage, is unseaworthiness: see *Kopitoff* v. *Wilson* (2) and *Steel* v. *State Line Steamship Co.* (3) It is otherwise if the defect can be readily remedied on the voyage: *Hedley* v. *Pinkney & Sons Steamship Co.* (4) In this case the vessel had on her hatch when she went out into rough weather two tons of cargo, very dangerous if so knocked about that its casing admitted water to the sodium. There was room in the forehold for this cargo, but it would be a difficult and dangerous proceeding in the rough weather in which the ship started to get the twenty cases, each

(1) 12 App. Cas. 518.
(2) 1 Q. B. D. 377.
(3) (1877) 3 App. Cas. 72.
(4) [1894] A. C. 222.

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weighing 2 cwt., out of their packing of ropes and tarpaulins and stow them in the forehold without getting them broken and wet. And wet on a broken case did all the mischief. I find therefore that the *Hardy* was unseaworthy at starting on her voyage, and that the unseaworthiness caused the loss.

I now come to the defences pleaded: (1.) Sect. 502 of the Act of 1894. On the facts I have found I hold that the goods were "lost by reason of fire," and if so it is immaterial that unseaworthiness caused the fire: see *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) The only exceptions to the protection given by the statute are (*a*) if the fire happened with the actual fault or privity of the owner, which, in the case of a limited company, means the person having the management, i.e., Mr. Lindley; (*b*) if the shipowner by his contract of affreightment has excluded the operation of the Act: see *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) cited above.

As to "actual fault or privity," I have had some doubt as to my finding, especially in view of the decision of Bray J. in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (2) On the one hand Mr. Lindley knew there was some danger, though not exactly what, and did not make inquiries, but relied on the railway classification as to packing, which does not with clearness apply to goods carried on decks of steamers. On the other hand, Mr. Lindley had nothing to do with the negligent stowage, or the insufficiency of packages. I think proper drums, properly secured, could have been carried safely on deck. In view of the fact that "fault or privity" implies blame or misconduct I have not been able to find Mr. Lindley guilty of this, and I find that the fire was without the fault or privity of the owner.

But it was next said that the parties by the bill of lading had by their contract excluded the operation of the statute, and reliance was placed on *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) already cited, where Bray J. and the Court of Appeal did hold the operation of the statute excluded by the bill of lading. I gather that this decision was based on (1.) the words "to be delivered subject to the clauses

(1) [1912] 1 K. B. 229. (2) 18 Com. Cas. 23.

and conditions," &c.; (2.) the exception "fire on board"; (3.) the provisional liability for unseaworthiness interpreted to be "I will be liable for unseaworthiness causing fire, unless reasonable care has been used to prevent it." I am bound by this decision, and it is immaterial whether I should have come to the same conclusion. In the case before me the same three points appear to exist except that the third should be expressed, in the defendants' view, at least as strongly as: "I am liable for unseaworthiness of the ship causing fire unless I have kept up the class of the ship." Under these circumstances I consider I am bound by the decision of the Court of Appeal to hold that the operation of the statute has been excluded by the bill of lading.

The defendants next rely on exceptions in the bill of lading. Of these, in my view, "fire on board," "perils of the sea," and "any neglect of the officers in the stowing of the ship" only apply if the ship is seaworthy: see *The Glenfruin* (1) and numerous other cases. It was said that the last exception expressly covered this case, but ample meaning is given to it by restricting it to negligent stowage damaging the cargo, but not rendering the ship unseaworthy.

Lastly it was said that by clause 11 the shipowner had protected himself from liability for unseaworthiness. Clause 11 reads as follows: "It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative, failing a class, the exercise by the shipowners and/or charterers or their agents of reasonable care and diligence in connexion with the upkeep of the ship) shall be considered a fulfilment of every duty, warranty, or obligation and whether before or after the commencement of the said voyage." In its widest meaning this clause would allow the shipowner if he kept up the vessel's class to refuse to proceed to the port of destination, and even to throw the cargo overboard. Counsel for the defendant shrank from this contention and suggested it should be limited to duties arising out of implied warranties. But two of these are to proceed without deviation and without delay; and keeping up the ship's class has nothing to do with these matters. A further restriction may be that it is limited to such matters

(1) 10 P. D. 103.

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connected with the upkeep of the ship as are the subject of class, and that as to them, though in fact he is wrong and the ship is unseaworthy in respect of them, yet, if the ship has her class, the shipowner is excused; while in matters connected with upkeep which are not the subjects of class, it is enough if the shipowner proves reasonable care in himself or his agents.

If this is the meaning I am not aware that the stowage on a particular voyage, though dangerous to the ship, affects her class, and if it is not the subject of class reasonable care was not used by the shipowner's agents in respect thereto. If this is so, the clause does not protect the shipowner. But I prefer to rest my decision on the wider ground that a shipowner desiring to protect himself from liability for the unseaworthiness of his ship must do so in clear and unambiguous terms, intelligible to ordinary business men: see per Lord Loreburn L.C. in *Nelson Line (Liverpool)* v. *James Nelson & Sons* (1), and for an example the reasoning of the Court of Appeal in *Owners of Cargo on board s.s. Waikato* v. *New Zealand Shipping Co.* (2) The late Lord Chancellor, in *Nelson Line (Liverpool)* v. *James Nelson & Sons* (3), puts it in this way: "I think the clause, taken as a whole, so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie Steamship Co.* v. *Borthwick* (4), 'an ambiguous document is no protection.' That is the ground on which I rest my opinion"; and Lord Halsbury said: "The known condition of the law is that unless protected by protective clauses the defendant is liable; he has only put together, or jumbled together, a number of phrases to which no legal interpretation can be given, and the result is that the state of liability under the law remains what it was and the defendant is liable."

(1) [1908] A. C. 16, at pp. 19, 20.
(2) [1899] 1 Q. B. 56.
(3) [1908] A. C. 16.
(4) [1905] A. C. 93, at p. 96.

In my view this clause, though I do not think it applies to unseaworthiness through bad stowage, is at any rate ambiguous both to lawyers and business men, and I hold it does not protect the shipowner. For these reasons there must be judgment for the plaintiffs for the value of the goods, which I understand is agreed, with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Ballantyne, McNair & Clifford.*
Solicitors for defendants: *Wm. A. Crump & Son.*

W. H. G.

CHALLIS *v.* WATSON.

1913
Feb. 6.

County Court—Practice—Removal of Action from County Court to High Court —Discretion of High Court or Judge thereof—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 126.

By s. 126 of the County Courts Act, 1888, proceedings commenced in the county court may be removed into the High Court if the High Court or a judge thereof "shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs . . . . as the High Court or a judge thereof shall think fit to impose":—

Held, that the section is not confined to cases in which the action which is the subject of the application for removal is in itself more fit to be tried in the High Court than in the county court. The section gives an absolute discretion to the High Court to consider, having regard to all the circumstances, whether it is desirable that the action should be tried in the High Court or remain in the county court.

APPEAL from the decision of Bailhache J. reversing the decision of a Master who (under s. 126 of the County Courts Act, 1888) had ordered the removal into the High Court of an action commenced in the county court.

On July 25, 1912, a collision occurred between a motor car and a taxi-cab, as a result of which damages were sustained by the owners of both vehicles. An action was commenced in the High Court in August by the owner of the motor car against the owners of the taxi-cab. In October the driver of the taxi-cab,

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who was not a party to the proceedings in the High Court, commenced an action in the Lambeth County Court against the owner of the motor car (the plaintiff in the High Court action) claiming damages for personal injuries sustained by him as the result of the accident.

The defendant in the county court action made an application that the county court action might be transferred to the High Court and tried with the High Court action on the ground that the issues in both actions were the same and the drivers of the vehicles the most material witnesses.

Sect. 126 of the County Courts Act, 1888, provides that proceedings commenced in the county court may be removed into the High Court if the High Court or a judge thereof "shall deem it desirable that the action or matter shall be tried in the High Court, and upon such terms as to payment of costs . . . . as the High Court or a judge thereof shall think fit to impose."

The plaintiff in the county court action filed an affidavit which had not been answered, from which it appeared that the financial position of the defendant in the county court was such that there was a possibility, if the action were transferred and the plaintiff were successful, that he would be unable to recover the damages and High Court costs from the defendant. The Master made an order for the removal of the action into the High Court upon condition that the plaintiff in the county court action should not be liable for more costs in the High Court than he would have to pay in the county court.

From this decision the plaintiff in the county court action appealed to the judge, who reversed the decision of the Master. The defendant in the county court action appealed to the Divisional Court.

Cababé, for the appellant. An order for the removal of the county court action ought to be made. There ought not to be two actions going on at the same time, one in the High Court and one in the county court, in each of which the same issues are involved. It is very undesirable that there should be two decisions, possibly conflicting, upon the same facts, and having regard to all the circumstances of the case it is desirable within

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the meaning of s. 126 of the County Courts Act, 1888, that the action should be tried in the High Court.

Thorn Drury, for the respondent. There is no precedent for removing a case from the county court to the High Court merely because another action involving the same issues has been commenced in the High Court, and the order ought not to be made in the present case. In all the reported cases where an order for removal was made there was something in the nature of the action itself which made it desirable that it should be tried in the High Court. That is not so in the present case. The plaintiff's action in the county court has already been delayed, and if the order for its removal is made it will be delayed still further. The plaintiff having chosen the proper tribunal for the hearing of his action ought not to be deprived of his appropriate remedy by the removal of the action to the High Court at the instance of a defendant whose financial position is precarious, merely because the defendant has commenced an action in the High Court against a third person. [*Donkin* v. *Pearson* (1) was referred to.]

Cababé replied.

LUSH J. I am of opinion that this appeal must be dismissed. The case is a very special and difficult one, as indeed are all cases in which three litigants are involved and the Court has to adjust their rights in a manner which shall be fair to all. With regard to s. 126 of the County Courts Act, 1888, in my judgment that section is in no way confined to cases in which the action which is the subject-matter of the application is in itself more fit to be tried in the High Court than in the county court. The section seems to me to be so framed as to give the most absolute discretion to the High Court or a judge thereof, and to enable the Court in any case, if it thinks it desirable that the county court action should be tried in the High Court, to order its removal. The section does not say that an order may be made if there is "a cause of action fit to be prosecuted in the High Court," which is the language used in s. 66 of the County Courts Act, 1888, which provides for the removal of actions of tort from the High Court

(1) [1911] 2 K. B. 412.

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into the county court when the plaintiff has no visible means of paying the costs of the defendant if unsuccessful. The section says that the action may be removed into the High Court if the High Court or a judge thereof shall deem it desirable that the action shall be tried in the High Court, and I think we must consider not only whether this particular action is more fit to be tried in the High Court, but whether, looking at all the circumstances, it is more desirable that it should be tried in the High Court rather than in the county court.

The question we have to decide is whether in all the circumstances of this case we ought to affirm the order of Bailhache J. allowing the action to proceed in the county court and refusing to remove it into the High Court.

[His Lordship then dealt with the facts and held that a sufficient case had not been made out to justify the Court in depriving the plaintiff in the county court of the remedy which the law gave him. The Court had before it an affidavit which had not been answered, from which it was manifest that the defendant in the county court action might not be in a position to pay damages and costs if the action were transferred into the High Court and the result were to be against him. If the action were transferred there might be delay, and it would be a much more costly proceeding. Therefore the proper course was to allow the two actions to proceed.]

ROWLATT J. concurred.

Appeal dismissed.

Solicitor for appellant: *W. H. Sturt.*

Solicitors for respondent: *Ransom & Williams.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

1913
Feb. 3.

THE KING *v.* FREDERICK AUSTIN.

Criminal Law—Living on Prostitution—Punishment—Whipping—Conviction as Rogue and Vagabond—Conviction on Indictment—"Second or subsequent conviction"—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1, *sub-s.* 1 (*a*)—*Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *s.* 7, *sub-s.* 5.

By s. 1, sub-s. 1 (*a*), of the Vagrancy Act, 1898, every male person who knowingly lives wholly or in part on the earnings of prostitution shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly.

By s. 7, sub-s. 5, of the Criminal Law Amendment Act, 1912, a person charged with an offence under the Vagrancy Act, 1898, may, instead of being proceeded against as a rogue and vagabond, be proceeded against on indictment. On conviction on indictment he is liable to imprisonment for a term not exceeding two years, "and, in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment, the Court may, in addition to any term of imprisonment awarded, sentence the offender, if a male, to be once privately whipped":—

Held that, in order to justify a sentence of whipping under this enactment on a second or subsequent conviction, it is not necessary that the previous conviction or convictions should be a conviction or convictions on indictment, or that it or they should have taken place since the Act.

Appeal from sentence.

The appellant was convicted at the Central Criminal Court in January, 1912, before Darling J. upon an indictment under s. 7, sub-s. 5, of the Criminal Law Amendment Act, 1912 (1),

(1) Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1: "(1.) Every male person who

"(*a*) knowingly lives wholly or in part on the earnings of prostitution . . . .

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), s. 7: " . . . .

"(2.) The period of imprisonment with hard labour which may be awarded to a person deemed to be a rogue and vagabond under the Vagrancy Act, 1898, ... shall be increased to six months, but such person shall not be liable to be dealt with as an incorrigible rogue within the meaning of the Vagrancy Act, 1824 . . . .

"(5.) A person charged with an offence under the Vagrancy Act, 1898, ... may instead of being proceeded against . . . . as a rogue and vagabond . . . . be proceeded against on indictment, and on

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charging him with knowingly living on the earnings of prostitution, an offence under the Vagrancy Act, 1898.

Before the passing of the Criminal Law Amendment Act, 1912, the appellant had been three times convicted of similar offences under the Vagrancy Act, 1898.

After the conviction in January, 1912, the learned judge passed a sentence of twelve months' imprisonment with hard labour and twenty-four strokes with the cat.

The question was whether in the circumstances the sentence of whipping could be imposed.

L. O'Malley, for the appellant. By s. 3 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), certain persons on being convicted as therein mentioned are declared to be idle and disorderly persons. By s. 4 a person convicted as an idle and disorderly person for the second time or found guilty of certain other offences is to be deemed a rogue and vagabond and is liable to three months' imprisonment. By s. 5 every person committing an offence against the Act which would subject him to be dealt with as a rogue and vagabond, and having been at some former time convicted as such, is to be deemed to be an incorrigible rogue and is liable to be committed by the justices to quarter sessions. By s. 10 the justices in quarter sessions were empowered in case of a man so committed to send him to prison for a year and order him to be whipped. The Vagrancy Act, 1898, enacted that a person who committed the offence with which the appellant was charged should be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and that he might be dealt with accordingly. Therefore for a second or subsequent offence such a person could be deemed an

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conviction on indictment shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years, and, in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment, the Court may, in addition to any term of imprisonment awarded, sentence the offender if a male to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence."

incorrigible rogue, and was liable to be committed to quarter sessions and by that Court sent to prison for a year and whipped.

The Criminal Law Amendment Act, 1912, altered this. It enacted in s. 7, sub-s. 2, that such a person should not be liable to be dealt with as an incorrigible rogue. Therefore he could no longer be sentenced to be whipped by a Court of quarter sessions. Then by s. 7, sub-s. 5, it was provided that he might be proceeded against by indictment. On a second or subsequent conviction, being also a conviction on indictment, he may be sentenced to be flogged. That must mean a second or subsequent conviction after the Act. The previous convictions in the present case were before the Act. A penal statute is not to be construed as having a retrospective effect.

[PHILLIMORE J. The Legislature may impute a retrospective gravity to an offence already committed: *Reg.* v. *Vine.* (1)]

It will only do so by unequivocal and unambiguous words. A line must be drawn between convictions before and convictions after the Act of 1912. A man guilty of an offence under the Act of 1898 cannot now be sentenced to be flogged except under the Act of 1912 after two convictions upon indictment, each of which takes place after the Act.

Travers Humphreys, for the Crown, was not called upon.

The judgment of the COURT (Ridley, Phillimore, and Avory JJ.) was delivered by

PHILLIMORE J. This is an appeal against a sentence pronounced by Darling J. at the Central Criminal Court upon the appellant, who was charged under s. 1, sub-s. 1 (*a*), of the Vagrancy Act, 1898, with knowingly living on the earnings of prostitution. Before the passing of the Criminal Law Amendment Act, 1912, which came into force on December 13, 1912, a man who was guilty of this offence might, by virtue of s. 1 of the Vagrancy Act, 1898, be brought under the Vagrancy Act, 1824. Under this Act a person may be convicted as a rogue and vagabond and, as such, committed by a Court of petty sessions to prison for any time not exceeding three calendar months. By s. 5 of the same Act in the case of any person committing any offence against the

(1) (1875) L. R. 10 Q. B. 195.

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Act which should subject him to be dealt with as a rogue and vagabond such person, having been at some former time adjudged so to be and duly convicted thereof, was to be deemed an incorrigible rogue, and the justices might commit such offender to the house of correction, there to remain until the next general or quarter sessions of the peace. By s. 10 the justices of the peace assembled in general or quarter sessions were empowered to examine into the circumstances of the case and to order, if they thought fit, that the offender should be further imprisoned, and to order further, if they thought fit, that the offender (not being a female) should be punished by whipping at such time during his imprisonment and at such place within their jurisdiction as according to the nature of the offence they in their discretion should deem to be expedient.

The Criminal Law Amendment Act, 1912, altered this law in two respects: first, by sub-s. 2 of s. 7 it extended the powers of the Court of summary jurisdiction, and enacted that the period of imprisonment with hard labour which might be awarded to a person deemed to be a rogue and vagabond under the Act of 1898 should be increased to six months; secondly, it took away the power to send the man to quarter sessions to be punished by whipping. It provided by sub-s. 5 that the person charged, instead of being proceeded against as a rogue and vagabond, may be proceeded against on indictment, and on conviction on indictment is liable to imprisonment, with or without hard labour, for a term not exceeding two years. It is not uncommon in an Act of Parliament to prescribe two alternative modes of procedure, one by way of summary proceedings with a small penalty, and the other by indictment where the punishment is or may be more severe. In the present instance the punishment on summary proceedings may amount to six months' imprisonment, while the punishment on indictment is a term of imprisonment not exceeding two years. Then come the words on which this appeal turns, "and, in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment, the Court may, in addition to any term of imprisonment awarded, sentence the offender if a male to be once privately whipped," &c. To a certain extent

therefore this Act is a measure in favorem of the accused, at any rate in so far as it provides that he shall never in any case be flogged unless convicted before a judge and jury.

The question is what is the meaning of the words "and, in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment." The appellant had been three times convicted on summary process, and once on indictment. Was this a "second or subsequent conviction, such second or subsequent conviction being a conviction on indictment" within the meaning of the enactment? It was argued on behalf of the appellant that a line must be drawn between convictions before and convictions after the Act. In our opinion no such line is to be drawn as is suggested. If this be so the statute does not say that the conviction must be the second of two convictions on indictment; it speaks of a second conviction, "such second conviction being a conviction on indictment." A man is not to be whipped except for a second offence, and then only where the second or subsequent offence has been made the subject of an indictment and has led to a conviction. He may still be convicted before a Court of summary jurisdiction. If it were not for the provision that the second or subsequent conviction must be on indictment, justices who convicted an old offender, and thought the case a proper one for severe treatment, might sentence him to be whipped. To prevent that the statute enacts that a sentence of whipping can only be passed on a second or subsequent conviction where that conviction has been on indictment. That does not mean that it must be the second of two convictions on indictment or that the former conviction or convictions as well as the second or subsequent convictions must be on indictment. Neither is it necessary that the previous conviction or convictions should have taken place since the Act of 1912. It was not intended by that Act to diminish the existing deterrents from these offences. Sect. 7, sub-s. 2, takes away the power which the Court of summary jurisdiction had of committing the prisoner to be dealt with by quarter sessions. If the argument for the appellant is sound the power to flog for a second or subsequent offence would be postponed and

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two convictions on indictment would have to be recorded against a persistent offender before that sentence of whipping could be passed which might have been passed three or four times under the old law. It is said that a retrospective effect must not be given to a penal statute. No doubt; one can hardly imagine the Legislature punishing a man for having done an act which at the time of its commission was a perfectly innocent act. But to prescribe punishment for an old offender in case in the future he persists in his crime is quite another matter. The offence in question was committed since the Act. The Act says that a man guilty in the future may, if he has already been guilty in the past, be punished as he could not have been before the Act. There is nothing wrong in that. No man has such a vested interest in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history.

For these reasons we are of opinion that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

W. H. G.

[COURT OF CRIMINAL APPEAL.]

1913
Feb. 6.

THE KING *v.* TIMOTHY PATRICK O'CONNOR.

Criminal Law—Procuring Prostitution—Punishment—Whipping—Proceedings pending—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 2, *sub-s.* 2—*Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *ss.* 3, 8.

By s. 3 of the Criminal Law Amendment Act, 1912, any male person who is convicted under s. 2 of the Criminal Law Amendment Act, 1885, may, at the discretion of the Court, and in addition to any term of imprisonment awarded in respect of the said offence, be sentenced to be once privately whipped as therein provided.

By s. 8 the Act shall not apply to proceedings pending at the commencement of the Act.

A person accused of an offence under s. 2 of the Act of 1885 was arrested and charged before, and tried and convicted after, the commencement of the Act of 1912. He was sentenced to be whipped under s. 3 of the Act:—

Held, that proceedings were pending at the commencement of the Act of 1912 within the meaning of s. 8 of the Act, and that there was no power to impose the sentence of whipping.

APPEAL against sentence.

The appellant was convicted at the Central Criminal Court before Darling J. of procuring a woman (who was in fact his wife) to become a common prostitute contrary to s. 2 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69). (1)

(1) Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 2: 'Any person who— . . . . (2.) procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute . . . . shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused."

Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), s. 3: "Any male person who is convicted under section 2 of the Criminal Law Amendment Act, 1885, may, at the discretion of the Court, and in addition to any term of imprisonment awarded in respect of the said offence, be sentenced to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall

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He was apprehended on December 7, 1912, and charged on December 9. He was tried at the Central Criminal Court on January 17 and 18, 1913, and was convicted.

The Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), contains the following provisions:—

Sect. 3: "Any male person who is convicted under section 2 of the Criminal Law Amendment Act, 1885, may, at the discretion of the Court, and in addition to any term of imprisonment awarded in respect of the said offence, be sentenced to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence."

Sect. 8: "This Act shall not apply to proceedings pending at the commencement of this Act."

The Act came into force on December 13, 1912.

The learned judge sentenced the appellant to be sent to prison with hard labour for eighteen months and to receive thirty lashes with the cat, but added that if he had been of opinion that there was no power to sentence the appellant to be whipped he would have imposed the maximum sentence of imprisonment, namely, two years.

The appeal was from this sentence.

The question was whether "proceedings" were, within the meaning of s. 8 of the Criminal Law Amendment Act, 1912, "pending at the commencement of this Act." (1)

Beaufoi Moore, for the appellant, stated the facts.

The COURT then called upon

Travers Humphreys, for the Crown. The words "proceedings pending at the commencement of this Act" in s. 8 of the Criminal Law Amendment Act, 1912, mean proceedings pending in the Court the powers of which are affected by the Act·

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be specified by the Court in the sentence."

Sect. 8: "This Act shall not apply to proceedings pending at the commencement of this Act."

(1) It was also contended on behalf of the appellant that there was not sufficient corroboration of the case for the prosecution within the proviso to s. 2 of the Criminal Law Amendment Act, 1885. This part of the case does not seem to call for a report.

In the case of an indictable offence the proceedings commence with the indictment; in the case of an offence punishable on summary conviction the proceedings may commence with the information or summons.

[AVORY J. By s. 17 of the Criminal Law Amendment Act, 1885, the offence with which the appellant was charged is subject to the provisions of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17). Would not a summons under that Act be a proceeding in this prosecution?]

If the Legislature had intended to exclude a case like this from the operation of the Act it might have enacted that the Act should not apply to any prosecution pending at the date of its commencement. "Prosecution" and "proceedings" are not the same thing. "Prosecution" includes the preliminary steps, but "proceeding" means process of that Court whose process is under consideration.

Beaufoi Moore replied.

The judgment of the COURT (Ridley, Phillimore, and Avory JJ.) was delivered by

RIDLEY J. The question is whether the proceedings in this case were pending on December 13, 1912, the date of the commencement of the Criminal Law Amendment Act, 1912. We are of opinion that they were. The appellant was apprehended on December 7 and charged on December 9. In the ordinary sense of the words these were proceedings pending on December 13 and awaiting final adjudication, which in this case took place on January 18, 1913. Mr. Travers Humphreys contended that "proceedings" must be distinguished from "prosecution," a word used in other statutes, (for example in s. 5 of the Criminal Law Amendment Act, 1885), as specifying the limit of time from the commission of the offence within which the accused is amenable to process. We cannot assent to this contention. In our view "proceedings" and "prosecution" mean practically the same thing in this connection. We can find nothing to distinguish the meaning of the two expressions. There has been a general understanding that in the proviso to s. 5 of the Act of 1885, which I have just mentioned, the words

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"no prosecution shall be commenced" indicate the information as the first step in the prosecution. That is the same thing as saying that the proceedings commence with the information. Indeed *Smith's Case* (1) is a direct authority in favour of this view. Sect. 3 of the Criminal Law Amendment Act, 1912, adds to the powers of the Court in trying offenders under the Act of 1885 and enables the Court to add a sentence of whipping to a sentence of imprisonment. It keeps alive s. 2 of the Act of 1885, and it seems to follow that proceedings taken under that Act and not disposed of at the passing of the Act of 1912 are "proceedings pending at the commencement of" that Act. Therefore by s. 8 there was no power to impose a sentence of whipping. But in view of the statement of the learned judge that, if he had not imposed this sentence, the sentence of imprisonment would have been two years, and having regard to the facts proved at the trial, we think that this is a proper case for exercising the power conferred upon the Court by s. 4, sub-s. 3, of the Criminal Appeal Act, 1907, and that the appellant should be sentenced to a term of imprisonment for two years from the date of his conviction.

Sentence varied.

Solicitor for appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitors for the Crown: *Wontner & Sons.*

(1) (1862) L. & C. 131.

W. H. G.

THE KING *v.* MITCHELL AND ANOTHER (JUSTICES OF CLITHEROE). *Ex parte* LIVESEY.

1912
Dec. 19.

Criminal Law—Offence triable summarily or on Indictment—Person accused before Court of Summary Jurisdiction—Objection to Jurisdiction—Power and Duty of Justices—Statute—Construction—Enabling Words—"May" equivalent to "must"—Conspiracy and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *ss.* 7, 9.

A person convicted of an offence under s. 7 of the Conspiracy and Protection of Property Act, 1875, by a Court of summary jurisdiction, or on indictment as thereafter in the Act mentioned, is liable to a penalty not exceeding 20*l.* or to imprisonment for a term not exceeding three months.

By s. 9 of the Act, where a person is accused before a Court of summary jurisdiction of an offence made punishable by the Act for which a penalty amounting to 20*l.*, or imprisonment, is imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a Court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly:—

Held by Lord Coleridge and Bankes JJ. (Ridley J. dissenting), that the effect of s. 9 is that a person accused of an offence under s. 7 before a Court of summary jurisdiction, who, on appearing before that Court, declares that he objects to being tried by that Court, has a right to have the case dealt with as if he were charged with an indictable offence and not an offence punishable on summary conviction, and to have the offence prosecuted on indictment accordingly.

Held, therefore, that in the phrases "thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence" and "the offence may be prosecuted on indictment" the word "may" is an enabling word empowering the Court of summary jurisdiction to give effect to the right of the accused, which accordingly that Court is bound to do.

Held, consequently, that, upon a declaration of objection being duly made under s. 9, the Court of summary jurisdiction has no jurisdiction to try the case.

Julius v. *Lord Bishop of Oxford* (1880) 5 App. Cas. 214, followed.

RULE NISI calling upon Clement Taylor Mitchell and A. Roberts, Esquires, two of His Majesty's justices of the peace for the borough of Clitheroe, to shew cause why a writ of certiorari

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should not issue to remove into the King's Bench Division a record of conviction under their hands and seals dated February 1, 1912, whereby Charles Roundell Livesey, the applicant, was convicted for that he on a date and at a place named with a view to compel two persons to join a trade union did unlawfully, wrongfully, and without legal authority follow the said two persons with other persons in a disorderly manner contrary to the provisions of s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). (1)

Sect. 9 of the same Act is in these terms: "Where a person is accused before a Court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a Court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly."

The grounds on which the rule was obtained were that, the applicant being accused before a Court of summary jurisdiction of an offence made punishable under the Act, for which a penalty of 20*l.*, or imprisonment, is imposed, and having in accordance with s. 9 of the Act declared that he objected to being tried for such offence by a Court of summary jurisdiction, the justices nevertheless dealt with the case in all respects as if the applicant had been charged with an offence punishable on summary conviction, and convicted the applicant and ordered him to pay

(1) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7: "Every person who, with a view to compel any other person . . . . to do any act which such other person has a legal right to . . . . abstain from doing, wrongfully and without legal authority,—

. . . . . .

"5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a Court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

a penalty of 5*s.* and costs or in default to go to prison for fourteen days.

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The facts were not in dispute. The question was whether the justices had exceeded their jurisdiction in dealing with the case as if the applicant had been charged with an offence punishable on summary conviction and in convicting the appellant as above stated.

Micklethwait, for the justices, and *Guy Lushington*, for the Chief Constable of Clitheroe, shewed cause. The question in this case is whether a person accused of an offence under s. 7 of the Conspiracy and Protection of Property Act, 1875, has a right to trial by jury if he claims it. If he has that right, then the justices are bound to give effect to his claim, although the words of s. 9 are merely enabling words enacting that the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence: *Julius* v. *Lord Bishop of Oxford.* (1) If he has not that right, then the words "may deal with the case," &c., give the justices a discretion whether to hear the case themselves and dispose of it summarily, or to send it for trial before a jury. The word "may" can never mean must; it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word "may," it becomes his duty to exercise it: *In re Baker, Nichols* v. *Baker* (2), per Cotton L.J.

No right to trial by jury is given by s. 9 of this Act. The offence with which the applicant was charged was created by the Criminal Law Amendment (Violence, &c.) Act, 1871 (34 & 35 Vict. c. 32), and could only be prosecuted in a Court of summary jurisdiction. The words of s. 9 of the Act of 1875 are not sufficient to confer a right to trial by jury. Where a person is accused before a Court of summary jurisdiction of an offence for which a penalty amounting to 20*l.*, or imprisonment, is imposed, the accused may on appearing before the Court of summary jurisdiction "declare that he objects to being tried for such offence by a Court of summary jurisdiction"; thereupon the Court of summary jurisdiction "may deal with the case,"

(1) 5 App. Cas. 214. (2) (1890) 44 Ch. D. 262.

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and the offence "may be prosecuted on indictment accordingly." Words such as those cannot be said to confer a right on the accused to trial by jury or to impose a duty on the Court of summary jurisdiction to send the case for trial by a jury. It follows that the justices had a discretion as to whether they would hear the case or not. It is not suggested that, if they had a discretion, they exercised it unreasonably. Consequently the rule ought to be discharged.

Eastham, in support of the rule. The effect of s. 9 of the Conspiracy and Protection of Property Act, 1875, is that when once the accused has declared that he objects to being tried by a Court of summary jurisdiction the justices have no discretion as to whether they shall hear a charge or send it for trial before a jury. Their duty is then merely ministerial. They are bound to send the charge for trial by a jury. They have to act before anything is submitted to them on which they can exercise a discretion. "On appearing before the Court" the accused may declare that he objects to the jurisdiction; "and thereupon"—i.e., before the case has been opened or any evidence called—"the Court of summary jurisdiction may deal with the case . . . . as if the accused were charged with an indictable offence and not an offence punishable on summary conviction . . . ." The same form of words appears in s. 92 of the Explosives Act, 1875 (38 & 39 Vict. c. 17), and in s. 15 of the Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77). These enactments have always been understood to confer on the accused the right to be tried by a jury, if he chooses to assert that right: Archbold, Criminal Pleading, 24th ed. (1910), pp. 5, 6; The Magistrate's Practice, 1912, p. 1040; Maxwell, Interpretation of Statutes, 5th ed. (1912), p. 401. If that be so, the justices in the present case were bound to send the case for trial by jury. Where a statute confers a right on a person, and then by such words as "may" or "it shall be lawful" empowers a Court to give effect to that right, the Court imposes upon itself the duty to vindicate that right, not because empowering words are to be construed as compulsory but, ex debito justitiæ, because of the compelling virtue of the right: *Macdougall* v. *Paterson* (1); *Julius* v. *Lord Bishop of*

(1) (1851) 11 C. B. 755.

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Oxford (1); *In re Eyre and Corporation of Leicester* (2); *Rex* v. *Roberts.* (3) In the concluding sentence of the enactment in question, "the offence may be prosecuted on indictment accordingly," the word "may" can only mean "must."

RIDLEY J. In this case I regret to say that the members of the Court are not unanimous. In my opinion the justices acted properly in this matter and had jurisdiction to do as they did. It must be admitted that the question is a difficult one. A form of words, obscure in itself, seems to have been adopted as applicable to cases of this sort; it occurs in s. 15 of the Cruelty to Animals Act, 1876, and in s. 92 of the Explosives Act, 1875. The Conspiracy and Protection of Property Act, 1875, first by s. 7 creates an offence by enacting that every person who uses violence, persistently follows, watches or besets, or follows with two or more other persons in a disorderly manner, shall on conviction thereof by a Court of summary jurisdiction, or on indictment as thereinafter mentioned, be liable either to pay a penalty not exceeding 20*l.* or to be imprisoned for a term not exceeding three months. Then by s. 9 it provides that "Where a person is accused before a Court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a Court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly." In the present case the person accused declared that he objected to be tried for the offence; the magistrates, however, dealt with the case as if it was one properly cognizable by a Court of summary jurisdiction and declined to send it for indictment to the assizes or to quarter sessions. The question we have to decide is whether they had a right so to do.

(1) 5 App. Cas. 214. (2) [1892] 1 Q. B. 136.
(3) [1901] 2 K. B. 117.

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Ridley J.

There are many cases upon the meaning of the words "may" and "it shall be lawful," and other words of a permissive character occurring in statutes, and decisions have gone the length of holding that the word "may" in certain cases is not permissive but obligatory, while the word "shall" in other cases is not obligatory but merely directory; contrary to the natural meaning of the word in each case. The principle to be extracted from the earlier cases, including the important case of *Macdougall* v. *Paterson* (1), is best stated in *Julius* v. *Lord Bishop of Oxford* (2), where that and many other previous decisions were reviewed in the House of Lords. The word "may" when it appears in a statute of this kind is a permissive word, unless there is at the same time a right conferred upon some other person in connection with which the permission or power is given. If that other person has a right which he is entitled to assert, then the word "may" is not merely a permissive but is an enabling word, empowering the persons in question to do their duty and give effect to the right. If the object for which the power is conferred is the vindication of the right, there may be a duty cast upon the donee of the power to exercise it when required for the benefit of those who have the right. The same principle is recognized in *In re Baker, Nichols* v. *Baker*. (3) In that case Lopes L.J. said: "Now the word used in sub-s. 4"—i.e., of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125—"is 'may,' and the word 'may' is beyond all question potential, it implies a power; but if it is coupled with a duty on the Court or the person to whom it is given to use that power in a certain particular way, it then no doubt becomes imperative." In other words, if a right is conferred upon one person and another person is empowered by the word "may" to recognize that right, that person is not only enabled but obliged to recognize the right, not because the empowering words oblige him, but because it is his duty to recognize the right. In that sense it is true to say that "may" is equivalent to "must," but in no other sense. Cotton L.J. said in the same case (4): "Great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean

(1) 11 C. B. 755.
(2) 5 App. Cas. 214.
(3) 44 Ch. D. 262.
(4) Ibid. at p. 270.

'must,' so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may,' it becomes his duty to exercise it." I understand that to mean that it is not the word "may" which imposes the obligation, but the circumstances in which the word is used may impose the obligation. Then the word may be equivalent to "must." We are all agreed that this is the principle to be applied. The difficulty, which has unfortunately divided the Court, is in the application of this principle to the section in question. If the Legislature had intended to give a right to trial at the assizes I think very different words would have been used. A declaration of objection to be tried for an offence does not necessarily involve a right to object to the jurisdiction. The section says that upon a declaration of objection the Court may do so and so; but in my view that does not give the person accused a right to object; it merely recognizes the fact that he may prefer to be tried elsewhere, and negatives the position that in all events and in all circumstances he must necessarily be tried by a Court of summary jurisdiction. His declaration of objection is not merely futile, because it is then incumbent upon the Court of summary jurisdiction to exercise honestly its discretion as to whether he should be dealt with there and then, or sent for trial elsewhere. The section continues "thereupon"—i.e., upon the declaration of objection—"the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly." I do not place upon the word "may" at the close of this passage nor upon the negative clause "not an offence punishable on summary conviction" the emphasis which Mr. Eastham would put upon them. The section appears to me to be purely permissive in its character, and therefore I think that the rule should be discharged.

LORD COLERIDGE J. The question in this case turns upon the construction placed on the word "may" in one portion only of s. 9 of the Conspiracy and Protection of Property Act, 1875.

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The word "may" is used three times in that section; first the accused "may," on appearing before a Court of summary jurisdiction, declare that he objects to being tried by a Court of summary jurisdiction. There the word is used in a discretionary and not in a compulsory sense. The Court of summary jurisdiction "may" thereupon deal with the case in all respects as if the accused were charged with an indictable offence, and not an offence punishable on summary conviction; that is the second occasion; the question is whether the sense in that context is discretionary or compulsory. The third occasion is where it is enacted that the offence "may" be prosecuted on indictment accordingly. Here the word is plainly compulsory. It is said that in the second case it is only discretionary because in the first case it is discretionary. That is a strange canon of construction of an Act of Parliament. Originally, and apart from surrounding circumstances, the word "may" in a statute means "may" and nothing else. That has often been laid down, especially by Cotton L.J. in *In re Baker, Nichols* v. *Baker*. (1) But it is equally clear that there are cases where the word "may" has the effect of "must." Apart from the cases which have been cited there is *Rex* v. *Justices of Dublin*. (2) By s. 5 of the Beerhouses (Ireland) Act, 1864 (27 & 28 Vict. c. 35), the superintendent of police of the Dublin Metropolitan Police district is authorized to object before justices to the issue of a certificate for a licence, and the justices shall in such case proceed to consider, examine on oath into, and adjudicate upon the truth, sufficiency, and validity of such objection; and if such justices shall be satisfied of the truth and sufficiency of any such objection, "they may refuse to grant such certificate." In construing this enactment Andrews J. said: "Having regard to these provisions, I think it clear, and it has not been disputed, that if the justice is satisfied of the truth, *sufficiency*, and validity of the objection, his duty is to refuse to grant the certificate, and that the word 'may' is to be interpreted in an obligatory, as distinguished from a merely permissive sense." Undoubtedly the word "may" there means must. Therefore regard must be had to the surrounding circumstances to discover whether the word "may" is to have a permissive or a compulsory meaning.

(1) 44 Ch. D. 262. (2) [1904] 2 I. R. 190.

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In the present case the surrounding circumstances are these: The accused may declare that he objects to being tried by a Court of summary jurisdiction. Are those idle words? Any one before any Court may object to be tried, and thereupon the Court would hear and decide upon the objection and determine it one way or other. But in the present case, on the accused declaring that he objects, "thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction." Similar words are used in the Explosives Act, 1875, s. 92. By s. 91 of that Act offences under the Act are grouped in two classes; every offence under the Act may be prosecuted and every penalty under the Act may be recovered either on indictment or before a Court of summary jurisdiction; but the penalty imposed by a Court of summary jurisdiction is not to exceed 100*l.*, nor is the term of imprisonment imposed by a Court of summary jurisdiction to exceed one month. By s. 92, when a person is accused before a Court of summary jurisdiction of any offence the penalty for which as assigned by the Act exceeds 100*l.*, the rights of the accused are then declared in exactly the same words in which the rights of the accused are enacted in the statute before us in the present case. Can any one doubt that the intention of the Legislature was that the accused should have a right to trial by jury? It must be remembered that the declaration of objection is not to be made to an independent tribunal, but to the persons whose jurisdiction is being objected to. In my view a statutory right to take objection to the jurisdiction of a tribunal in a matter involving the liberty of the subject ought prima facie to carry with it a right to have the objection entertained. I do not regard *Julius* v. *Lord Bishop of Oxford* (1) as opposed to this view. The words of the statute in that case were "it shall be lawful." The statute gave the bishop an alternative liberty, either on the application of any party complaining or, if he should think fit, of his own mere motion, to issue a commission under his hand and seal for the purpose of making an inquiry in certain circumstances. It is pointed out

(1) 5 App. Cas. 214.

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in the judgments of the noble and learned Lords that the objector might be any man, woman, or child in the kingdom who might be unable to pay costs and might impose upon the bishop the burden of a commission, which he was not desirous of granting, at the instance of a person who had no real interest in demanding it. In these circumstances the House of Lords held that the statute did not give to all and sundry on their mere application the right to have a commission granted by the bishop. The House of Lords reviewed the authorities, including the important case of *Macdougall* v. *Paterson* (1), in which Jervis C.J., approving the judgment of Coleridge J. in *Reg.* v. *Tithe Commissioners* (2), said this (3): "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application. For these reasons we are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the Court and judges; and that the exercise of such power depends, not upon the discretion of the Court or judge, but upon the proof of the particular case out of which such power arises." In *Reg.* v. *Tithe Commissioners* (4) Coleridge J., delivering the considered judgment of the Court of Queen's Bench, said: "The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." Lord Blackburn in *Julius* v. *Lord Bishop of Oxford* (5) cited this passage with approval, saying that the only part of it to which exception can be taken is the use of the word "public." "It is far more easy," added Lord Blackburn, "to shew that there is a right where private interests are concerned than where the alleged right is in the public only." Next I would refer to *In re Baker*, *Nichols* v. *Baker* (6), where Cotton L.J. said: "I think great misconception is caused by saying that in

(1) 11 C. B. 755.
(2) (1849) 14 Q. B. 459.
(3) 11 C. B. at p. 773.
(4) 14 Q. B. 459, at p. 474.
(5) 5 App. Cas. 214, at p. 244.
(6) 44 Ch. D. 262.

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some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may,' it becomes his duty to exercise it." That only emphasizes and repeats the authorities up to that date which decided that where persons have a personal right, which may be extended to a public right, to object to the jurisdiction of a Court, then, if the Court is empowered by the word "may" to accede to that right, the word "may" is compulsory and not discretionary.

For these reasons I think the rule should be made absolute.

BANKES J. I agree with my brother Ridley that the principle to be applied is that laid down in *Julius* v. *Lord Bishop of Oxford.* (1) I differ with regret in the application of that principle to the section in question, i.e., s. 9 of the Conspiracy and Protection of Property Act, 1875. I think it is material to notice that precisely the same form of words is used in two other statutes. One is the Cruelty to Animals Act, 1876, dealing with offences in cases of vivisection. The other is the Explosives Act, 1875. In both cases this particular power, whatever it may be, is confined to the more serious class of offences created by those Acts. The same may be said of the Act in question, which creates a number of offences. In s. 4 there are offences punishable on summary conviction with a penalty not exceeding 40*s.* In s. 5 there are offences punishable on conviction thereof by a Court of summary jurisdiction, or on indictment as thereinafter mentioned, with a penalty not exceeding 20*l.* In s. 6 an offence is created punishable on summary conviction by a penalty not exceeding 20*l.* or imprisonment not exceeding six months. No mention is made of indictment in connection with that offence. Sect. 7 is the section under which the proceeding in question was taken; it provides that a person convicted under it "by a Court of summary jurisdiction or on indictment as hereinafter mentioned shall be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not

(1) 5 App. Cas. 214.

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exceeding three months." Then comes s. 9. It begins by excluding from the operation of the section all the lesser offences and is confined to those in which a penalty of 20*l.* or imprisonment is imposed. It is said that this section should be read as enacting that where a person is accused before a Court of summary jurisdiction he may apply to be tried before a jury, and on any such application the justices may in their discretion either try the case themselves summarily or remit the same for trial by a jury. I do not take that view of the section. I may say in passing that it says nothing about the accused making an application; it contemplates a much more definite position being taken up by the accused. He may declare that he objects to being tried for such offence by a Court of summary jurisdiction. In my opinion those words give him a right, that is to say an effective right, to object to the jurisdiction; a right such as is indicated by Lord Blackburn in *Julius* v. *Lord Bishop of Oxford* (1), where he said that if the object for which a power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have the right, when required on their behalf. Having formed a clear opinion as to the effect of this enactment, I feel it my duty to express it, although I regret the difference of view between my learned brother and myself.

Rule absolute.

Solicitor for applicant: *R. H. Bentley, for J. J. Briggs, Padiham.*

Solicitors for justices: *Stow, Preston & Lyttelton, for T. Eastham, Clitheroe.*

Solicitors for chief constable: *W. J. & E. H. Tremellen, for W. S. Weeks, Clitheroe.*

(1) 5 App. Cas. 214.

W. H. G.

[COURT OF CRIMINAL APPEAL.]

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Feb. 17.

THE KING *v.* DAVIES.

Criminal Law—Fraudulent Trustee—Treasurer of Friendly Society—Misappropriation of Funds—Prosecution—Necessity of Sanction of Attorney-General—Larceny Act, 1901 (1 *Edw.* 7, *c.* 10), *s.* 1.

The sanction of the Attorney-General is not a necessary preliminary to the prosecution of an offender under s. 1, sub-s. 1, of the Larceny Act, 1901.

APPEAL to the Court of Criminal Appeal.

The appellant was tried at the Worcester Assizes on an indictment under s. 1, sub-s. 1, of the Larceny Act, 1901 (1), charging that he having been entrusted by sundry persons with money to the amount of 64*l.* 5*s.* 7*d.* did fraudulently convert the same to his own use. The appellant was the treasurer of a friendly society at Worcester known as the Old Greyhound Slate Club, and the money in question was the property of the club and had been entrusted to him in his capacity as treasurer. He had been appointed to that office under the rules of the club, and his duty in respect of the application of the money received by him as treasurer was also defined by the rules. That duty was to pay out money to members becoming entitled to sick pay, and once a year at Christmas time to divide the surplus among the members. At the close of the case for the prosecution it was objected on behalf of the appellant that the offence with which he was charged was an offence "included in" s. 80 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), that the sanction of the Attorney-General to the prosecution was consequently necessary, and that in the absence of proof of that sanction the prosecution must fail. The judge, Channell J., overruled the objection and the appellant was convicted.

(1) By the Larceny Act, 1901, s. 1, sub-s. 1, "Whosoever—

"(*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof . . . . fraudulently converts to his own use or benefit . . . . the property or any part thereof or any proceeds thereof shall be guilty of a misdemeanour."

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H. G. Farrant, for the appellant. The sanction of the Attorney-General was necessary to the prosecution. By s. 80 of the Larceny Act, 1861, "Whosoever being a trustee of any property for the use or benefit either wholly or partially of some other person . . . . shall with intent to defraud convert or appropriate the same or any part thereof to or for his own use or benefit . . . . shall be guilty of a misdemeanour . . . . Provided that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of Her Majesty's Attorney-General"; and by s. 1 of that Act "the term 'trustee' shall mean a trustee on some express trust created by some deed, will, or instrument in writing." Every person who is entrusted with the money of others is in the widest sense of the term a trustee of that money, and if he is so entrusted on the express terms of an instrument in writing he is a trustee within s. 80. Here the appellant was entrusted with the money as treasurer on the terms of the club rules which expressly defined his duty in respect of it. Those rules were an "instrument in writing" within the meaning of s. 1 of the Act of 1861. In *Reg.* v. *Fletcher* (1) the prisoner was convicted, under the corresponding section of the Fraudulent Trustees Act, 1857 (20 & 21 Vict. c. 54), in which the language was precisely the same, of having misappropriated the money of a savings bank of which he was trustee, treasurer, and secretary. His duties in respect of the money received by him on account of the institution were, as here, defined by the rules of the institution. It was held that he was a trustee within the meaning of the Act, and that the rules were an instrument in writing creating an express trust. The appellant then might have been indicted under s. 80 of the Act of 1861, and his offence was consequently an "offence included in" that section. He could not indeed before 1901 have been charged under that section, for s. 75 of the Act of 1861, which corresponds to s. 1, sub-s. 1, of the Act of 1901, expressly provided that "nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever," including instruments other than a deed or will. That section, s. 75, is now repealed by the Act of 1901, but s. 1, sub-s. 2, which

(1) (1862) 9 Cox, C. C. 189.

corresponds to the excluding clause in s. 75, differs in its terms; it runs thus: "Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will," omitting all reference to instruments in writing other than deeds or wills. The result is that now, in such a case as the present, it is at the option of the prosecution whether they will proceed under s. 80 of the Act of 1861 or under the Act of 1901, and as the offence is an "offence included in" s. 80, the sanction of the Attorney-General is necessary none the less because the prosecution elect to proceed under the later Act.

Hon. R. Coventry, for the prosecution, was not called upon.

The judgment of the COURT (Darling, Phillimore, and Pickford JJ.) was delivered by

PHILLIMORE J. We are of opinion that this appeal must be dismissed. Under the Act of 1857 entitled "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property" it was provided by s. 1 that "If any person being a trustee of any property for the benefit, either wholly or partially, of some other person . . . . shall with intent to defraud convert or appropriate the same or any part thereof to or for his own use . . . . he shall be guilty of a misdemeanour," and by s. 17 the word "trustee" was defined to mean "a trustee on some express trust created by some deed, will, or instrument in writing." It was under that statute that *Reg.* v. *Fletcher* (1) was decided. There the prisoner was trustee, treasurer, and secretary of the society. He was indicted as trustee. It was contended that he was not a trustee within the meaning of the Act, and, secondly, that his trust, if any, was not created by an instrument in writing. It was held that he was a trustee, because he was so in fact, and it was in respect of his breach of duty as trustee that he was charged. He was not the less a trustee because he was also the treasurer. And further it was held that as his duties as trustee were expressly defined by the rules of the society, his trusteeship was on an express trust created by an instrument in writing. That statute was repealed by the Larceny

(1) 9 Cox, C. C. 189.

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Act, 1861, by s. 75 of which it was enacted that "Whosoever having been entrusted . . . . as a banker, merchant, broker, attorney, or other agent with any money . . . . with any direction in writing to apply, pay, or deliver such money . . . . for any purpose or to any person specified in such direction" should fraudulently convert it to his own use should be guilty of an offence. The section went on to say that "nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever." Then s. 76 said that similar classes of agents who were entrusted with any property "for safe custody" and fraudulently converted the same to their own use should also be guilty of an offence. Then s. 80 dealt with trustees who were excluded from the operation of s. 75, and provided that no prosecution for any offence included in that section should be commenced without the sanction of the Attorney-General. Sect. 75 was intended to deal with the class of persons who were entrusted with money as part of their business, and presumably for reward; s. 80 was intended to deal only with the class of trustees who were appointed under a formal instrument, and who in general discharged their duties gratuitously. The two sections were meant to be mutually exclusive. No one could come within both. There was consequently no difficulty under that Act in saying whether the particular offence charged was one which required the sanction of the Attorney-General as a preliminary to prosecution. So long as s. 75 remained unrepealed the words of s. 80 "any offence included in this section" could mean nothing else than "any offence under this section." Then came the Act of 1901, s. 1 of which follows to some extent the language of s. 75 of the earlier Act, but omits to qualify the word "whosoever" by reference to bankers and other classes of agents, and also omits the condition of a "direction in writing"; it runs: "Whosoever—(*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof," fraudulently converts it to his own use shall be guilty of an offence. That takes the place of ss. 75 and 76, but

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it leaves s. 80 untouched. It goes on to say, indeed, that nothing in the section shall apply to "any trustee on any express trust created by a deed or will." But to my mind that provision is wholly unnecessary, for, as I have said, the classes of offenders who are dealt with respectively by this section and s. 80 of the Act of 1861 are mutually exclusive. It cannot be that the fact of the repeal and re-enactment of s. 75 in slightly different language can enlarge the meaning of the words of s. 80 "any offence included in this section" and enable them to include an offence which they could not have included before 1901. We are therefore of opinion that the requirement of the Attorney-General's sanction is confined to the case of a prosecution under s. 80 of the Act of 1861 and has no application to a prosecution under the Act of 1901.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Jan. 13, 20.

SHIPP *v.* FRODINGHAM IRON AND STEEL COMPANY, LIMITED.

Employer and Workman—Compensation—Basis of Calculation—"Average weekly earnings"—Deductions from Wages—Working in Gangs—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., s.* 2 (*a*), (*d*).

In a claim for compensation under the Workmen's Compensation Act, 1906, founded upon the average weekly earnings of the workman, it appeared that his work was that of a miner of ironstone, and he formed one of a gang of fifteen men similarly employed. In getting the ironstone it was necessary to remove sand and use gunpowder for blasting. The gang were paid at the rate of 6¾*d.* per ton for ironstone plus a bonus of 3¾ per cent., and 2½*d.* per yard for sand with a bonus of 6¼ per cent. From the aggregate of these sums was deducted the value of the powder used by the gang, and the net sum was paid to the ganger, who distributed it amongst the men in proportion to the number of hours they had worked. The employers provided the powder at cost price. The workman claimed 14*s.* 7*d.* per week on the ground that his average weekly earnings had been 1*l.* 9*s.* 2*d.*, namely, his share of the full amount due to the gang without deducting anything

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for powder supplied to them. The employers contended that 3*s.* a week per man for powder ought to be deducted from the wages, and that the applicant was only entitled to half of 1*l.* 6*s.* 2*d.*:—

Held, that Sched. I., s. 2 (*d*), of the Act did not apply; that the employers had only contracted to pay the applicant an aliquot share of the gross earnings of the gang less the value of the powder used by them; and that he was only entitled to compensation at the rate of half of 1*l.* 6*s.* 2*d.*

APPEAL from an award of the judge of the Brigg County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Charles Shipp whilst in the employment of the Frodingham Iron and Steel Company, Limited, met with an accident for which the company admitted liability to pay half wages as compensation, and a question arose as to the amount of his average earnings on which the compensation was to be calculated. His work was that of a miner of ironstone, and he formed one of a gang of fifteen men similarly employed. In the getting of the ironstone it was necessary to remove sand and use gunpowder for blasting purposes. The gang were paid at the rate of 6¾*d.* per ton for ironstone plus a bonus of 3¾ per cent., and 2½*d.* per yard for sand plus a bonus of 6¼ per cent. From the aggregate of these sums was deducted the cost of the powder used by the gang, and the net sum was paid to the ganger, who distributed it in equal shares amongst the men in proportion to the number of hours they had worked. It was stated that for the convenience of the men the company obtained the powder and supplied it to them at cost price. The men were not compelled to get the powder from the company, but were at liberty to get it where they pleased.

Shipp commenced arbitration proceedings and claimed to be paid 14*s.* 7*d.* per week on the ground that his average weekly earnings of the twelve months previous to the injury had been 1*l.* 9*s.* 2*d.* per week, namely, his share of the full amount due to the gang without deducting anything for powder supplied to them. The company answered that 3*s.* a week for powder ought to be deducted from this sum and that the applicant was only entitled to a half of 1*l.* 6*s.* 2*d.*

The learned county court judge held that the applicant was

entitled to compensation at the rate of 14*s.* 7*d.* per week on the basis that his wages averaged 1*l.* 9*s.* 2*d.* per week; and the company appealed.

Atkin, K.C., and *Compston*, K.C., for the appellants. Under the contract between the company and the applicant it is impossible to calculate the 3*s.* for powder as if it had been paid to the workman and formed part of the credit side of the account. It was not paid to him at all, but was deducted from the gross earnings of the gang before the actual amount of the earnings was arrived at. The learned judge was right in holding that this 3*s.* was not a sum paid to the workman to cover any special expense, and therefore that Sched. I., s. 2 (*d*) (1), of the Workmen's Compensation Act, 1906, did not apply to the case, but he was mistaken in saying that "average weekly earnings" within Sched. I., s. 2, were the gross earnings without any deduction. The intention of s. 2 is shewn by the first three lines of sub-s. (*a*), "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." The learned judge thought that this case was analogous to *Abram Coal Co.* v. *Southern* (2), a decision on the Act of 1897. In that case the word "earnings" was construed to mean the gross wages which the workman was entitled to receive apart from deductions, but the amount deducted was part of the wages, whereas here there never was a period of time at which the applicant was entitled to receive the 1*l.* 9*s.* 2*d.* He could not have sued for more than 1*l.* 6*s.* 2*d.*; and the contract was not with him individually, but with the gang. *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (3), *M'Kee* v. *John*

(1) Workmen's Compensation Act, 1906, Sched. I., s. 2: "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—

"(*a*) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. . . . .

"(*d*) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings."

(2) [1903] A. C. 306.

(3) [1901] 1 Q. B. 93.

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S. Stein & Co. (1), *and Midland Ry. Co.* v. *Sharpe* (2) are distinguishable on the same grounds. The principle on which average earnings should be calculated is shewn by *Perry* v. *Wright.* (3)

Scott Fox, K.C., Coutts Trotter, and *W. Stanley Meeke,* for the applicant. *M'Kee* v. *John S. Stein & Co.* (1) was rightly decided so far as explosives were concerned and exactly covers this case. The only distinction between that case and the present appeal is that here the money was payable to a gang. That makes no difference. The contract was with the ganger, and he could have sued for wages at the rate of 1*l.* 9*s.* 2*d.* The workmen were at liberty to buy powder where they pleased. Sched. I., s. 2 (*d*), was introduced to meet the decision in *Midland Ry. Co.* v. *Sharpe* (2) and was not meant to overrule all the other cases. It does not apply to this case. All the cases cited by the appellants were under the Act of 1897 except *M'Kee* v. *John S. Stein & Co.* (1) The 3*s.* for powder was not an expense entailed by the nature of the employment, as were the wages of the drawer in that case. It formed part of "the full sum for which the" applicant was "engaged to work": *Abram Coal Co.* v. *Southern.* (4) Wages are an indemnity against travelling expenses and wearing out clothes and the like, and the section cannot be intended to apply only to money payable into the workman's pocket.

Atkin, K.C., replied.

Cur. adv. vult.

Jan. 20. COZENS-HARDY M.R. read a judgment as follows: The only question in this appeal is as to the meaning of the words "average weekly earnings" of the workman. It appears from the evidence and the judgment of the learned county court judge that a gang of miners, said to be fifteen in number, are employed by the company, the head of the gang receiving money from the company and distributing it between the members of the gang rateably in accordance with the number of hours worked by each man. The work is paid for at a percentage rate for

(1) (1909) 3 B. W. C. C. 544; 47 Sc. L. R. 39.
(2) [1904] A. C. 349.
(3) [1908] 1 K. B. 441.
(4) [1903] A. C. 306.

every ton of stone raised by the whole gang and at a different rate for each yard of sand got by the whole gang. Powder is used for blasting purposes, and during the whole relevant period this powder has been supplied by the company at cost price. It is only the net sum which is received by the ganger and divided between the members of the gang. The earnings of an individual member of the gang do not depend upon the amount of stone or sand which he himself has raised, nor upon the amount of blasting powder which he himself has used. It is admitted that the average weekly sum actually received by Shipp was 1*l.* 6*s.* 2*d.*, and that the average cost per man of blasting powder for the whole gang was 3*s.* per week.

In these circumstances the learned county court judge has held that the average weekly earnings were 1*l.* 9*s.* 2*d.* and not 1*l.* 6*s.* 2*d.* The learned judge seems to have addressed his mind to the question whether the case fell within Sched. I., s. 2 (*d*), and he held, rightly as it seems to me, that the 3*s.* was not a sum paid to the workman within the meaning of that sub-section. I am, however, unable to agree with the conclusion at which he arrived, because I think there never was a contract by the employer to pay Shipp 1*l.* 9*s.* 2*d.* a week or any other sum than his aliquot share of the net earnings of the gang, that is to say, the gross earnings of the gang, less the value of the powder used by the gang. This figure is 1*l.* 6*s.* 2*d.*

In my opinion this case is plainly distinguishable from the case of an individual workman who is entitled to definite wages from which the employer is by contract allowed to make a deduction. It is sufficient for me to say that when such a case arises under the Act of 1906 it may be necessary to consider the effect of the change of language in that Act, where, for the first time, "remuneration" is the word used. I do not wish to be considered as either assenting to or dissenting from the view on this point expressed in the Scotch Court in the case of *M'Kee* v. *John S. Stein & Co.* (1)

In my opinion the appeal should be allowed. It will not be necessary to send the matter back, for it is admitted that the

(1) 3 B. W. C. C. 544; 47 Sc. L. R. 39.

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proper award is either one half of 1*l.* 9*s.* 2*d.* or one half of 1*l.* 6*s.* 2*d.* The respondent must pay the costs of the appeal.

BUCKLEY L.J. delivered the following written judgment. In my judgment the appellants are entitled to succeed. There is a difference material to the present matter between, first, earnings and a right in the employer to make a deduction from those earnings, and, secondly, earnings arrived at by finding a sum which is the difference or is a certain fraction of the difference between two sums. The present case is one of the latter kind. The county court judge has I think found as a fact that the earnings of the gang are a sum arrived at by first making an arithmetical calculation based upon so many pence per ton for ironstone and so many pence per yard for sand and adding to those sums respectively the proper bonus in each case and from the sum thus arrived at deducting the cost of the powder, and has found that the balance arrived at is the sum to be divided between the members of the gang. The applicant's earnings are his proportion (calculated according to the hours he has worked) of the difference between the one sum and the other. The applicant is not paid for the amount of ironstone or sand he has got and is not charged with the amount of powder he has used. His earnings are his proportion of a differential sum, namely, the difference between the agreed rate for the ironstone and sand got by the gang and the agreed cost of the powder used by the gang. The relation between the employer and the employed seems to have been one in which this workman and fourteen others agreed with the employer to serve him for a remuneration such that each man is entitled to his share of the aggregate sum arrived at in that way. There is no deduction as between the employer and any one of the employed. The deduction is made as between the employer and all the employed in the aggregate. The remuneration payable as between any one of the gang and the employer is that man's proportionate part of the sum arrived at after deduction of the cost of the powder used not by himself alone but by himself and others. The Act of 1906 contains for the first time directions as to how earnings are to be

computed. Sched. I., s. 2 (*a*), provides that they shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Lord Macnaghten in *Abram Coal Co.* v. *Southern* (1) (a case under the Act of 1897) said that "earnings" mean "the full sum for which the man is engaged to work" and not "the net remuneration received by the workman or the balance left for him to spend on himself and his family." When the matter arises for consideration under the Act of 1906 it may be that s. 2 (*a*) coupled with s. 2 (*d*) may render it necessary to consider whether those words in their full meaning are strictly applicable under the present Act. Under s. 2 (*d*) sums which would have been included in earnings under the previous Act (*Midland Ry. Co.* v. *Sharpe* (2)) are excluded under the present Act, and it may be that that consideration throws some light upon the true meaning of s. 2 (*a*). Thus by way of illustration, if a man be employed at 27*s.* a week and 3*s.* for gunpowder, the 3*s.* is excluded by s. 2 (*d*). Suppose the employment were 30*s.* a week, the man finding his own powder—it may be difficult to say that the 3*s.* a week is in that case to be included in the earnings under the words "the rate per week at which the workman was being remunerated." But this consideration only becomes relevant where the employment is such as I first mentioned, namely, an employment at certain earnings and a deduction to be made from the earnings, and does not arise in the present case if I am right in thinking that the employment here was of the second description and the earnings were to be arrived at by finding a sum which is a certain fraction of the difference between two sums. In the present case I think that the 26*s.* 2*d.* and not the 29*s.* 2*d.* are the earnings computed upon the footing of s. 2 (*a*) of the Act of 1906.

HAMILTON L.J. read the following judgment. I agree. The true question is whether the injured man's average weekly earnings were 29*s.* 2*d.* less a deduction of 3*s.* for blasting powder supplied to him by his employers and used by him for the purposes of his work, or were only 26*s.* 2*d.*, being his proportionate

(1) [1903] A. C. 306—308. (2) [1904] A. C. 349.

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share, having regard to the number of men in his gang and the hours worked by each man, of a gross sum available as a common wages fund and calculated by applying agreed tonnage rates and agreed bonuses to the number of tons of ironstone and sand got by the gang collectively, and then debiting the product with the cost price to the employers of the blasting powder collectively expended in winning that weight of mineral. This is a question of fact. How has the learned judge found it? He gave a considered judgment two months after the hearing, having taken only a scanty note of the evidence, which included references to three decisions cited before him. He first states "the difference between the parties" in a way that is consistent with the first view in the first part of it and with the second view in the latter part. He says that "about 3*s.* per week was deducted by the company from each man's wages for powder" (which, as a literal statement of what actually was done, is not in agreement with his note of the evidence), and then proceeds, "the men worked in gangs and each gang was paid" at certain rates for ironstone and sand respectively. He gives next, by way of example, an actual calculation of the tonnage rates and bonuses for particular quantities collectively won, and proceeds: "Deduct from this the cost of powder used by the gang, 3*l.* 4*s.*, and it leaves a balance of 26*l.* 10*s.* 1*d.* to be divided between the members of the gang." This accords with his note of the applicant's own uncontradicted evidence. Later on he says: "It transpired in the course of the arbitration that certain terms were made between the workman and the company, which I have above recited" (that is to say, in the above passage), but he proceeds: "from that it appears that each workman was to be paid a sum of money amounting roughly to 29*s.* 2*d.* per week, and that from that sum the company should deduct the cost of the explosives, about 3*s.* per man per week." He concludes: "In my opinion the facts are practically similar to those in *Abram Coal Co.* v. *Southern* (1), *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (2), and *M'Kee* v. *John S. Stein & Co.* (3)," the three cases which he had noted as cited at the hearing. In

(1) [1903] A. C. 306.
(2) [1901] 1 Q. B. 93.
(3) 3 B. W. C. C. 544; 47 Sc. L. R. 39.

these cases no question of working in gangs arose. In the first two a definite sum was found in the case of the individual workman as the amount of his average weekly earnings, and questions arose as to the legal effect of deductions, which in fact were made from those earnings every week, principally for goods supplied to him or for work done and sums paid for him or for his use and impliedly at his request. To this must be added, in the last case, the circumstance that the workman's wages were enhanced by reason of the fact that he himself provided and paid a drawer who assisted him, a circumstance to which there is nothing analogous in the present case.

The learned judge no doubt thought that the present case ought to be decided upon legal considerations substantially the same as those acted upon in those decisions, but it is impossible to presume that he found that the facts as to the workman's average weekly wages were the same here as in those cases, for they were not. His note of the evidence shews the contrary. His own statement of "the arrangement for payment" is at variance with it. As he says, "it was argued by the applicant workman that 29*s.* 2*d.* were his wages," and he agreed with the argument, but I do not think that he means to find 29*s.* 2*d.* in fact as the actual average weekly earnings. He thought that in law they might be treated as if they were 29*s.* 2*d.*, and that the real question was whether the cost of blasting powder used among the gang could be rateably divided among the members and whether a sum equivalent to each man's rateable share could then be said to be "a sum to cover any special expenses entailed on" the workman "by the nature of his employment." In law I think this was wrong. Sched. I., s. 2, sub-s. (*d*) does not apply to the facts of this case. The question is how much the man's average weekly wages were, "computed," as they must be computed, "in such manner as is best calculated to give the rate per week at which the workman was being remunerated."

As far as finding the facts goes, I think that the learned judge meant to find that the man's average weekly wages were 26*s.* 2*d.* This is entirely in accordance with the evidence, and there is no

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evidence at all of any payment of individual wages at the rate of 29*s.* 2*d.* or of any actual deductions made therefrom of 3*s.* or thereabouts. The men in the gang are not partners. Privity of contract by way of hiring and service exists between each one of them and the appellants. They have, so far as the evidence shews, no privity of contract inter se, except in so far as the foreman of the gang may be agent for each member of it severally for certain purposes not here material. The sum which is paid to each man has no precise relation to the actual quantity of material that he himself has won, or to the actual quantity of explosive that he himself has expended in winning it. Counsel admit that the individual workman cannot claim to have less deducted for powder in his case than is deducted against other members of the gang merely upon the ground that he has been more frugal than the others in using it. No one suggests that any member can claim a higher sum for his work on the ground that he is a better or more industrious workman than the rest and can win more tons in the same time than they can. It may be that in the long run all will be fairly equal in both respects, but the pith of "the arrangement" is that, whether they are so or not, they share and share alike relatively to the number of hours they have worked, and share a sum of money that represents the common result of their work. They are not partners. They do not buy the powder in bulk collectively. They do not buy it individually. No property in specific charges passes to individuals as they use them. I think it is quite immaterial whether they are entitled to buy powder from strangers and use it instead of using the employers' powder. During the relevant period it is admitted that this was not done. The true effect of the facts, as proved below or admitted before us, is that a computation is made, by which a gross sum, based on tons got and on tonnage rates and bonuses agreed, is reduced to a net sum by a deduction for the aggregate cost of powder expended, and that only thereafter are the wages paid or calculated at all. In fact, this man's average weekly wages were 26*s.* 2*d.* This is what I think the learned judge found, and it concludes the case. He thought it competent to him to remodel the finding of fact argumentatively in order to apply a paragraph of the schedule

which is really inapplicable. In this I think he was wrong, and the appeal must succeed.

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Appeal allowed.

Solicitors: *Arthur E. Burton, for Scatcherd, Hopkins, Middlebrooks & Brighouse, Leeds; H. G. Campion & Co., for Arthur Neal & Co., Sheffield.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A. 1913 *Jan.* 16.

KIERSON *v.* JOSEPH L. THOMPSON & SONS, LIMITED.

Employer and Workman—Costs—Successful Party ordered to pay Costs—County Court Judge—Jurisdiction—Judicial Exercise—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., pars.* 7, 9 (*a*)—*Workmen's Compensation Rules, r.* 49 (8.).

A workman who was in receipt of a weekly payment of 13*s.* 5*d.* from his employers as compensation for an accident within the meaning of the Workmen's Compensation Act, 1906, entered into an agreement to accept 100*l.* in satisfaction of the employers' liability. The workman applied to the registrar to have a memorandum of the agreement recorded. The registrar, being dissatisfied as to the amount of the commutation, referred the matter to the judge. Both parties appeared and supported the agreement. The judge overruled the objection as to quantum, and directed the memorandum to be recorded, ordering the employers to pay the costs. The employers appealed from the order as to costs:—

Held, assuming that the county court judge had a discretion as to costs, it was not a judicial exercise of that discretion to order a party who had been completely successful and against whom no misconduct was alleged to pay the costs of the proceedings.

APPEAL by the employers against a decision of the judge of the Sunderland County Court.

The workman, Charles Kierson, was a caulker in the employ of Messrs. Thompson & Sons, Limited, and on March 31, 1911, met with an accident to his eye while at work in their shipbuilding yard. He was paid compensation at the rate of 13*s.* 5*d.* per week from the date of the accident down to June 4, 1912, when an agreement was come to between him and the company by which he accepted the sum of 100*l.* in full satisfaction of their liability. Kierson applied to the registrar under Sched. II.,

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paragraph 9, of the Workmen's Compensation Act, 1906, to record a memorandum of this agreement. The registrar refused to do so solely on the ground that the amount was inadequate and referred the matter to the judge. Both the employers and workman appeared before the judge, and both parties supported the agreement. The judge held that the registrar had ample grounds for refusing to record the memorandum without further inquiry, but as the parties were agreed he directed it to be recorded. But with reference to the costs the judge said he was of opinion that the workman ought to have his 100*l.* clear, and ordered the employers to pay the costs of the inquiry, which were taxed at one guinea.

From the decision as to costs the employers appealed.

Neilson, for the appellants. The judge had no jurisdiction to order the appellants to pay the costs. By Sched. II., paragraph 7, the costs of and incidental to the arbitration are to be in the discretion of the county court judge subject to Rules of Court, and r. 49 (8.) deals with this class of application and says: "The provisions of the Act and these Rules as to the costs of an arbitration before the judge shall apply to any such inquiry. And in particular, if it appears that a report of the registrar has been rendered necessary by the neglect or refusal of any party to an agreement to furnish any information reasonably required of him by the registrar, such party may be ordered to pay the costs of the inquiry." Here there has been no such refusal or default by the appellants, and the judge had no power to order them to pay costs.

There is no jurisdiction to make a successful applicant pay costs: *Foster* v. *Great Western Ry. Co.* (1); *Jones* v. *Great Central Ry. Co.* (2); *Evans* v. *Gwauncaegurwen Colliery Co.* (3); *Lowestoft Corporation* v. *Aldridge* (4); *Connor* v. *Meads.* (5) At any rate, if there be any discretion in the judge he must exercise it judicially, and he has not done so in this case.

Kierson did not appear.

(1) (1882) 8 Q. B. D. 515.
(2) (1901) 4 W. C. C. 23.
(3) (1912) 5 Butt. W. C. C. 441.
(4) (1912) 5 Butt. W. C. C. 329.
(5) (1912) 5 Butt. W. C. C. 435.

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COZENS-HARDY M.R. I think we must allow this appeal. The facts are simple. The workman, who had been in receipt of a weekly payment by way of compensation in respect of an accident, came to an agreement with his employers to accept the lump sum of 100*l.* in satisfaction of their liability. He then applied to the registrar to record a memorandum of the agreement. The registrar thought he could not be responsible for accepting it and referred the matter to the judge. Both the employers and the workman were then cited to appear and did appear before the judge. The objection to the agreement was solely based on quantum, and this objection the judge overruled, and held that the memorandum should be recorded. Assuming, as I do, that the judge had a discretion as to costs, it must be exercised judicially, and, in my opinion, it was not a judicial exercise of his discretion to order a party who has been completely successful and against whom no misconduct is even alleged to pay costs. This appeal must therefore be allowed.

BUCKLEY L.J. I agree.

HAMILTON L.J. I agree.

Appeal allowed.

Solicitors: *Botterell & Roche, for Botterell & Roche, Sunderland.*

G. A. S.

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[IN THE COURT OF APPEAL.]

GODDEN *v.* W. COWLIN & SON.

Employer and Workman—Compensation—"Average weekly earnings"—"Impracticable"—Short Period of Employment—Future Wages—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *s.* 1 (*b*), *s.* 2 (*a*), *s.* 3.

By the Workmen's Compensation Act, 1906, Sched. I., s. 1 (*b*), the compensation for an injury under the Act is a weekly payment based upon the average weekly earnings of the workman during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer. Sect. 2 (*a*): "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, ... it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, ..."

In a claim for compensation under the Act it appeared that the workman had been in the employment of his employers at wages which averaged 1*l.* 15*s.* per week for more than twelve months prior to December, 1910, when he left their employment. In May, 1911, he went to Canada, where he received wages averaging 5*l.* 3*s.* a week. In November he returned to Bristol and made arrangements to transfer his family to Canada in April, 1912. To fill up the time he went back to his employers and worked for them for nine weeks at an average of 1*l.* 9*s.* 6*d.* per week. In February he sustained personal injury by accident.

On a question as to the amount of the average weekly earnings of the workman, the county court judge held that it was not impracticable to compute the rate of remuneration from the earnings during the period of nine weeks on the basis that the applicant was about to leave the country, and awarded 14*s.* 9*d.* per week:—

Held, on appeal, that the learned judge had jurisdiction to compute the average earnings on the footing that the employment of the applicant was only of a temporary character, and that the appeal must be dismissed.

Appeal from an award of the judge of the Bristol County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

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James Godden had been in the employment of Messrs. Cowlin & Son as a builder's carpenter, at wages averaging 1*l.* 15*s.* per week, for more than twelve months prior to December, 1910, when he left their employment. In May, 1911, he went to Toronto, in Canada, and received there wages averaging about 5*l.* 3*s.* a week. He returned to Bristol in November, 1911, and made arrangements to transfer his home to Toronto, taking passages for April 17, 1912. To fill up the interval he went back to Messrs. Cowlin & Son on December 29, 1911, and worked for them for nine weeks at a rate of 9*d.* per hour, on the understanding that he was only there until he went to Toronto and that he intended to go there for good. On February 29, 1912, he met with an accident arising out of and in the course of his employment by which he lost the sight of his right eye and the sight of his left eye was affected. During the nine weeks he earned a total of 13*l.* 5*s.* 10½*d.*, shewing an average for those nine weeks of 1*l.* 9*s.* 6*d.* The employers contended that compensation ought to be paid to him at the rate of 14*s.* 9*d.* per week, namely, half of the 1*l.* 9*s.* 6*d.*, whilst Godden maintained that he was entitled to 17*s.* 6*d.* per week, i.e., half of 1*l.* 15*s.*, his average earnings for the twelve months prior to December, 1910.

The learned judge held that it was not impracticable to compute the rate of remuneration from the period of nine weeks during which Godden had been employed since his return from Canada; that he was entitled to take into consideration Godden's intention to leave the country; that the circumstances that his wages would have been higher in the summer and that he had been hindered by the weather were immaterial; and he held that the proper rate of compensation was half 1*l.* 9*s.* 6*d.*

The applicant appealed, on the grounds that (1.) there was no evidence on which the learned judge could find that 1*l.* 9*s.* 6*d.* was the rate per week at which the applicant was being remunerated; (2.) that the learned judge had taken a wrong view of the law in holding that the rate per week at which the applicant was being remunerated was determined by the period of actual employment; and that (3.) he was wrong in holding that the fact that the applicant had previously worked on another and better paid employment and was intending to return to another

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and better paid employment was a matter material to be considered in arriving at the rate per week at which the applicant was being remunerated.

Sankey, K.C., and *W. Shakespeare*, for the appellant. The learned judge has taken into consideration what the applicant intended to do rather than what he had done. There was no evidence on which the learned judge could find the average weekly earnings to be 1*l.* 9*s.* 6*d.*, and he was wrong in holding that it was practicable to find an average within Sched. I., s. 2 (*a*) of the Act of 1906. That should be computed on the basis of the last twelve months that he worked for the employers, including summer wages, which are much higher than winter wages. The whole wages for twelve months must be averaged: *White* v. *Wiseman*. (1) In computing earnings future events cannot be taken into consideration: Sched. I., s. 1 (*b*). "Average weekly earnings" in the Act mean the earnings which the workman has been receiving. The learned judge had no right to take into consideration the circumstance that the applicant intended to leave the country in April.

[COZENS-HARDY M.R. referred to *Perry* v. *Wright*. (2)]

That case deals with wages in past harvests, not in future harvests, and it lays down that the wages earned at the date of the employment cannot be the sole test. Average depends on facts, not on prophecies, and the Court cannot look to the future merely because the employment has been for a period less than twelve months. If in this case the future is to be considered the amount of Canadian wages ought also to be included. The word "impracticable" means impracticable to arrive at a fair conclusion: *Jury* v. *Owners of S.S. Atlanta*. (3)

Harold Morris, for the employers, was not called upon.

Cur. adv. vult.

Feb. 5. COZENS-HARDY M.R. The appellant is a carpenter who for many years had been employed by the respondents, but in 1911 he went to Canada and worked there for some months,

(1) [1912] 3 K. B. 352. (2) [1908] 1 K. B. 441, 452.
(3) [1912] 3 K. B. 366, 369.

earning very high wages. In the late autumn he returned to Bristol for the purpose of bringing back his wife and family and settling permanently in Canada. He booked his passage by a vessel due to sail on April 17, 1912. Meanwhile he thought it better to take some temporary work, and he applied to his old employers. They were informed of the position, in his own words, "I intended to go to Toronto for good: it was understood by the firm." He worked for his old employers for nine weeks until February 29, when he met with a serious accident which injured his eyes, and for a time he was totally incapacitated.

The only question is what was the amount of his "average weekly earnings" within the meaning of the Act. The learned judge has held that although the period of employment was only nine weeks it was not impracticable for him to compute the average weekly earnings, and he has taken the actual sums received during these nine weeks, and divided by 9. In my opinion there is no error of law in this award. The employment was, and was known to be, of a temporary character, and I think to give the appellant the benefit of the higher wages which a carpenter earns when the days are longer, and to take an average over a full twelve months, would not be reasonable, or at least, and it is sufficient to say this, that it was not obligatory upon the county court judge to do this.

It was argued that the county court judge had no right to prophesy as to the future, or to do anything except to consider what was the applicant's position as a carpenter on February 29. But he was not an ordinary carpenter. He was employed in circumstances which precluded him from taking up that position. The county court judge did not base his finding upon any estimate of future earnings. But he was entitled to say, "Here is a man only temporarily in Great Britain, filling up the time between his arrival from Canada and his return passage to Canada." Summer earnings were not in the contemplation of any one.

I do not think that the view which I have now expressed is in any way inconsistent with what I said in *Perry* v. *Wright* (1) with respect to seasonable occupations.

The appeal must be dismissed with costs.

(1) [1908] 1 K. B. 441.

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BUCKLEY L.J. I am unable to find any misdirection in this case. Under Sched. I, s. 1 (*b*), the judge was in the facts of this case to ascertain the average weekly earnings during the period less than twelve months during which the workman had been in the employment of these employers, and in doing so was to observe the introductory words of Sched. I., s. 2 (*a*). He was therefore directed by the statute to ascertain the average for the nine weeks unless in his judgment (and it was for him) it was necessary to take a longer period in order to comply with Sched I., s. 2 (*a*). He directed himself that inasmuch as the man had come home from Toronto for a short visit, and was going back to Toronto again on April 17, the period which he ought to take was the nine weeks. In my judgment this was for him. But, further, while taking this short period he was not necessarily excluded from regarding the circumstances of the employment, such as whether the wage was abnormally high or abnormally low during the period under review. He found it practicable to compute the rate of remuneration fairly notwithstanding the comparative shortness of time. Whether it was practicable or not was question of fact, and he held that it was practicable. He took the average for the period which the statute names and in no way I think misdirected himself as to the manner in which under the statute he was to proceed in arriving at the average weekly earnings. I think the appeal fails and should be dismissed with costs.

HAMILTON L.J. The learned judge in effect found, as on the evidence he well might find, that the workman was a temporary visitor to this country, filling in his time before his approaching departure by arrangement with the employers. This being so, he thought that he could, in the words of the Master of the Rolls in *Perry* v. *Wright* (1), "estimate what I may call the normal rate of remuneration of the injured man" by dividing the earnings received during the actual temporary employment by the number of weeks that it lasted. In so doing I cannot see that he was not observing the rule that "average weekly earnings shall be computed in such manner as is best calculated

(1) [1908] 1 K. B. 441.

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to give the rate per week at which the workman was being remunerated." Whether a given number of days of rain was normal or abnormal in January was a question of fact for him. Considerations of trade union hours per week in the month of June were irrelevant to the "normal rate of remuneration of the injured man," for he was employed in January and February and had arranged to be elsewhere in June. The learned judge did not find it "impracticable at the date of the accident to compute the rate of remuneration," that is to compute it fairly and not merely arithmetically. He was not bound to do so. He found it practicable with the materials he had, and so it was. He did not misdirect himself, for it is not an error in law to have regard to what was the fact, that the workman was a bird of passage. I think the appeal fails.

Appeal dismissed.

Solicitors: *Ford & Ford, for Wansbroughs, Robinson, Tayler & Taylor, Bristol; Metcalfe & Lefroy, Bristol.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A. 1913 *Jan.* 28; *Feb.* 6.

HIGGS & HILL, LIMITED *v.* UNICUME.

Employer and Workman—Compensation—Termination of Agreement—Review—Refusal to work—Doctor's Advice followed—Reasonable—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A workman having met with an accident in the course of his employment, his employers agreed to make him weekly payments by way of compensation. Subsequently they applied under the Workmen's Compensation Act, 1906, for the diminution or termination of the compensation on the ground that he had sufficiently recovered to do suitable light work and that he had refused to do it. It appeared that his refusal was based on his doctor's advice, but the medical evidence before the county court judge as to his capacity for work was conflicting. The judge held that, acting on unwise medical advice and the domination of his wife, the workman had behaved in an unreasonable way, although he was not a malingerer; and he terminated the agreement for compensation:—

Held, on the findings of fact, that the workman's present condition was not the result of the accident; that he might be acting unreasonably

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although he was following the advice of his doctor; and that an appeal from the judge must be dismissed.

Per Cozens-Hardy M.R.: The weekly payments ought to be reduced to 1*d.* per week and not terminated altogether.

APPEAL from an award of the judge of the Camberwell County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On March 29, 1909, James Unicume, a bricklayer, whilst in the employment of Higgs & Hill, Limited, met with an accident for which the employers agreed to pay compensation at the rate of 1*l.* per week. In September, 1912, the employers applied for the diminution of the compensation on the ground that the workman had sufficiently recovered to enable him to do suitable light work and had refused to do it. On October 22 the learned judge adjourned the case and removed a stay of execution with regard to the 1*l.* a week. The employers thereupon served notice of an application for termination of the agreement. On November 19 at the hearing it was proved that the employers offered the workman light work as timekeeper, but that acting upon his doctor's, Dr. Fielder's, advice he refused the offer. The medical evidence was conflicting, the workman's witnesses alleging that he was still incapable of doing work, and the employers' witnesses stating that he had completely recovered from the accident and could work if he would make up his mind to try. The medical referee agreed with the latter and said that the man was unreasonable in refusing to work and that he had recovered from the physical and any subsequent nervous symptoms connected with the accident.

The learned judge found as facts that the workman was offered light work which had been unreasonably refused; that an average reasonable man suffering as the respondent did would long ago have gone back to work; and that acting on unwise medical advice and the domination of his wife he had behaved in an unreasonable way; but he did not think he was a malingerer. The learned judge added that the medical referee reported that the employers' medical evidence gave the correct view of the man's condition, and that a continuance of compensation was likely to keep up that condition. The judge agreed

that this was the correct view; and he terminated the agreement as from October 22, 1912. Unicume appealed on the grounds that (1.) there was no evidence upon which the learned county court judge could end and he was wrong in law in ending the weekly payments; (2.) there was no evidence that the incapacity of the workman for work resulting from the accident had ceased on October 22, 1912, and the learned judge misdirected himself in ending the weekly payments as from that date; (3.) the learned judge was wrong in law in holding that it was unreasonable conduct on the part of the respondent to follow the advice of his doctor; (4.) that on the evidence the respondent was entitled to an award.

W. Shakespeare, for the appellant. The learned judge had no power to terminate the agreement unless he found that the incapacity to work had ceased, or would have ceased if the applicant had acted reasonably, and that his present condition was not due to the accident; and there is no such finding: *Marshall* v. *Orient Steam Navigation Co., Ld.* (1) If the learned judge had found as a fact that the applicant would have recovered his health if he had begun to work he might have ended the weekly payments, but he has not done so: *Warncken* v. *R. Moreland & Son, Ld.* (2) There is nothing to deprive the applicant of compensation. It cannot be said that a workman who consults a qualified medical man acts unreasonably if he follows his advice and the doctor has acted reasonably: *Rothwell* v. *Davies* (3); *Tutton* v. *Owners of Steamship Majestic.* (4)

Douglas Knocker, for the employers. The award appealed from is right. The learned judge has practically found that the applicant's present incapacity is not due to the accident, and that is enough to enable him to terminate the compensation: *Holt* v. *Yates & Thom* (5); *Turner* v. *Brooks & Doxey, Ld.* (6); *Humber Towing Co., Ld.* v. *Barclay.* (7) This is a decision on a question of fact with which this Court will not interfere.

Shakespeare in reply.

Cur. adv. vult.

(1) [1910] 1 K. B. 79.
(2) [1909] 1 K. B. 184.
(3) (1903) 19 Times L. R. 423; 5 W. C. C. 141.
(4) [1909] 2 K. B. 54.
(5) (1909) 3 B. W. C. C. 75.
(6) (1909) 3 B. W. C. C. 22.
(7) (1911) 5 B. W. C. C. 142.

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Feb. 6. The following written judgments were delivered :—

COZENS-HARDY M.R. In March, 1909, a bricklayer was seriously injured by the fall of a piece of timber. The accident admittedly arose out of, and in the course of, his employment. He received compensation at the rate of 1*l.* a week until September, 1912. The employers alleged that he had sufficiently recovered to enable him to do suitable light work, that he had refused to do it, and they applied that the weekly payment might be diminished. It is important to observe that they did not originally allege that it should be terminated although they by a second application asked for termination. The workman, by his answer, stated that he had not sufficiently recovered to enable him to do the work which the employers offered him. The matter came before the county court judge, there being medical evidence on both sides. The findings of fact by the learned judge we are of course bound to accept, unless he has misdirected himself in point of law. He has found that the man was offered light work which had been unreasonably refused; that an average reasonable man, suffering as the respondent did, would long ago have gone back to work; that acting on unwise medical advice, and the domination of his wife, he had behaved in an unreasonable way, but that he was not a malingerer. And the learned county court judge agrees with the medical referee, who reports that the employers' medical evidence gives the correct view of the man's condition, and that a continuance of compensation was likely to keep up his present condition. The medical evidence adopted by the county court judge is to the effect that there are no objective signs, that he could do work as gatekeeper or timekeeper, that he is suffering from weakness of will, and a fixed, but erroneous, idea that he is a chronic invalid. In these circumstances I think it was quite right to diminish the compensation and thus to furnish a stimulus to the resumption of work.

But the county court judge wentf urther than the employers asked by their original application and terminated the compensation. I think he might well have reduced the compensation to 1*d.* a week, which would allow the man to apply hereafter for an increase if, as a result of trial, it should turn out that he is really

not able to do his work. It must not be forgotten that a nervous ailment is often a real ailment. He was a bricklayer, and there is no evidence that he is now able to resume his work as a bricklayer, beyond the statement that there is no physical disability preventing him from acting as timekeeper, or "beginning work as a bricklayer." It seems to me that this is pre-eminently a case in which the conflicting opinions of medical men should be allowed to be subject to the test of actual experiment. In my opinion the appeal ought to be allowed, the compensation reduced to 1*d.* per week, the workman should have his costs of the appeal, and there should be no costs before the county court judge.

BUCKLEY L.J. Before the judge there was a conflict of medical evidence. It was for him to determine how the facts were. He has found that the employers' medical evidence gives the correct view of the man's condition. The substance of that evidence is that the man's complaint of his symptoms is not well founded, that nothing would be better for him than work or occupation, that he was fit for work when he left hospital, that he could do work as a gatekeeper or timekeeper, that he has no physical disability preventing him from acting as a timekeeper or beginning work as a bricklayer, and that he is merely suffering from weakness of will and a fixed but erroneous idea that he is a chronic invalid—that he wants a stimulus to work. That is a finding of fact that the man has recovered and is fit for work. There is one sentence in the learned judge's judgment the other way, and that is where he says, "I do not think that he is a malingerer." A malingerer is a person who is not ill and pretends that he is. If he bona fide thinks he is ill he is not guilty of that pretence. That is, I think, what the judge meant to affirm. The man, he thinks, is not shamming, but erroneously believes that his condition is that which it is not. The judge says that he is not a malingerer because he is not shamming, but he finds in fact to the effect which I have stated. Upon these findings I think that the judge was right in terminating the award and that this appeal must be dismissed with costs.

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HAMILTON L.J. The question in this case is, what exactly was the view which the learned county court judge took of the facts. He did not decide that the workman was unreasonable because his doctor was unreasonable. He did not decide that the workman, being what he was, acted unreasonably, because he was not other than what he was. He did not decide that the workman was unreasonable because he paid heed to his wife's opinion. These suggestions of the appellant do the judgment less than justice.

In my opinion the findings of fact amount to this. The man is in any view nearly well. The only thing that stands between him and complete recovery is that he is persuaded that he is not recovered. He is not a conscious impostor: on the other hand he is not out of his mind or the victim of mental delusions. He is a weak creature and will not nerve himself to try what he can do. So completely are his injuries healed, so completely is his health restored, that if he were a man of average will power he would try to work, and trying would succeed. Solvitur ambulando. Being what he is he will not take the first step and only so remains incapable.

Is then this absence of will or paralysis of will itself part of his injury arising from the accident? The learned judge thinks it is not, and the evidence bears him out. He thinks the man has a will though a weak one, that he has listened to bad advice, and has on that determined his will in favour of doing nothing. The man believes in himself so far that he persuades himself that he cannot do what he wills not to do.

It is said, "if this was his meaning, why has the learned judge not said so?" I think, however, that he has. It is true that he might have said it more precisely, but in the stress of a county court judge's heavy work it may well be that an extempore judgment may fail to be as precise as a written one. That he misdirected himself in point of law is most unlikely. The topic is one to which the learned judge had given special attention in the case of *Turner* v. *Brooks & Doxey, Ld.* (1), and he had the great advantage of hearing counsel of unsurpassed knowledge of the relevant authorities. Light is thrown on what he meant to

(1) 3 B. W. C. C. 22.

find by considering the evidence before him and the terms of his award. The latter postulates findings such as I have set out: the former amply warrants them, and barely seems capable of supporting any others. Even Dr. Fielder's opinion and certificate were only to the effect that the man "could not do continuous work." The learned judge accepted the evidence of the employers' medical witnesses, one of whom said that he could "find no physical disability preventing the man acting as timekeeper or beginning work as a bricklayer," which was his old occupation, and none of the others disputed this. The employers case was, "if he will only begin, he will go on." The learned judge took this view, and in my opinion thought that the man had no infirmity but that of irresolution; that he had no one to thank for this but his wife, who was anything but irresolute; and that it was not due to his old injury arising from accident.

The contention has been raised that, as a matter of law, the learned county court judge misdirected himself, because he did not hold that a man cannot act unreasonably if he proves that he acted on the advice of "his own doctor." No authority has been cited which goes so far as this. Reasonableness is a question of fact depending on the actual circumstances of each case. Sometimes on a given set of circumstances the true rule is that an inference of unreasonableness cannot in law be drawn from them; sometimes it is the other way about. We cannot lay down a hard and fast rule in advance, dependent not on all but on one only of the circumstances. Where the subject-matter of the advice is one upon which the workman neither has nor can be expected to have any competence or knowledge, his election in favour of the course recommended to him by competent advisers is no evidence in itself of unreasonableness on his part in taking that course: *Tutton* v. *Owners of Steamship Majestic.* (1) When the matter is one where he does possess competence and knowledge, it may be otherwise. Here the employers offered light work, and, as the workman must have known, did so on medical advice. They impliedly encouraged him to undertake it. Dr. Fielder certified that he was not yet

(1) [1909] 2 K. B. 54.

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fit for continuous work, and he then decided not to try to work at all. No one suggests that trying the light work would have done him any harm or caused him suffering. The learned judge believes that it would have done him good physically, and especially so in dissipating by the test of experience his notion that he was incapable. The man refused. How can it be said that there was not here evidence on which the learned judge could, as the judge of fact, determine the question of reasonableness?

The remaining question is whether it was right to terminate the payment of compensation altogether, or whether there ought to have been a declaration for payment of 1*d.* per week. This also depends on the finding of fact. I think that finding is, "nothing prevents the entire removal of the man's incapacity except his own unreasonable refusal to test his capacity. If he would do that, he would find, as is the fact, that he is now once more a capable bricklayer, and he would soon be a robust one." The effect of this is that the incapacity resulting from the accident has ended. If so, there was jurisdiction to terminate the compensation. Such incapacity as remains is the man's own fancy: it results from his own unreasonableness.

The application as originally made was to reduce, not to terminate, the payments, and it is objected that an order to terminate should not have been made. At the hearing the whole of the applicants' evidence was directed to making a case for terminating the payments, and the respondent's medical evidence, that the workman was not fit for continuous work, was directed to and traversed this issue. A further request for termination was lodged during the proceedings, and the learned judge, in view of his finding of fact, was entitled to make the order which he did make. It is not as though he had decided an issue never raised, to which the respondent had had no opportunity of addressing himself, in which case the appeal must have succeeded. I think the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *E. Cobbing; Algernon D. Vandamm & Co.*

H. C. R.

[IN THE COURT OF APPEAL.]

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Jan. 25, 27;
Feb. 6.

MITCHINSON *v.* DAY BROTHERS.

Employer and Workman—Compensation—Accident arising "out of" the Employment—Assault by Stranger—Risk incidental to Employment—Protection of Employer's Property—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

In a claim for compensation by the dependants of a deceased workman under the Workmen's Compensation Act, 1906, it appeared that the deceased was a carter in charge of a horse and van belonging to his employers. A drunken man having stopped near the horse's head, the deceased, who was standing near the horse, warned him to come away lest the horse should hurt him; whereupon he struck the deceased two blows on the head, causing injuries from which death resulted:—

Held, that the risk of assault was not incidental to and the accident did not arise out of the deceased's employment, and compensation was not payable.

Craske v. *Wigan* [1909] 2 K. B. 635, explained.

APPEAL from an award of the judge of the Birmingham County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Thomas Mitchinson was a carter in the employment of Messrs. Day Brothers, furniture removers at Birmingham. On July 15, 1912, he took to Bonham's yard an empty van belonging to Mr. Bonham and started back to his employers' yard with an empty van belonging to his employers. The horse used for these purposes belonged to his employers. The horse and Messrs. Day Brothers' van were standing outside Bonham's yard when a drunken man called Parkes approached and stopped near the horse's head. Mitchinson, who was standing near the horse, told him to come away or the horse might hurt him. Parkes then struck Mitchinson on the side of the head two blows from the effect of which he died. Mitchinson's widow and children applied for an arbitration and claimed 180*l.* compensation from the employers. The latter, amongst other answers, alleged that the deceased's death was not caused by accident arising out of and in the course of his employment.

The county court judge held that the injury was caused by

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accident, and that it was a risk reasonably incidental to and arising out of his employment.

It was not disputed that it arose in the course of his employment.

The employers appealed.

Shakespeare, for the appellants. The question here is whether the workman sustained an injury by accident arising out of and in the course of his employment. There is no evidence that he was exposed to any special risk of being assaulted by a drunken man by reason of his employment: *Nisbet* v. *Rayne* (1); *Blake* v. *Head*. (2)

[HAMILTON L.J. referred to *Collins* v. *Collins*. (3)]

The principles laid down by this Court are wide enough to cover this case. Even if there was a risk of assault in this particular neighbourhood the respondents must shew that the workman was by reason of his employment "exposed to some peculiar danger": per Cozens-Hardy M.R. in *Warner* v. *Couchman*. (4)

Walsh, for the respondents. It was clearly the duty of the workman in this case to protect his master's property, namely, the horse, and to prevent something which might have led to the horse bolting and thus causing risk to the public. If then the workman was acting in the performance of his duty, how can it be said that the injury, assuming that it was an accident, did not arise out of his employment? Any act done by a workman in the course of his employment to protect his master's property must necessarily arise out of the employment.

In *Rees* v. *Thomas* (5), where a man admittedly in the course of his employment did something in the interest of his master in a sudden emergency and he was killed, it was held that the accident arose out of his employment.

[COZENS-HARDY M.R. referred to *Collins* v. *Collins*. (3)]

That is very different from this case. There the workman, as

(1) [1910] 2 K. B. 689.
(2) (1912) 5 B. W. C. C. 303.
(3) [1907] 2 I. R. 104.
(4) [1911] 1 K. B. 351, 353; [1912] A. C. 35.
(5) [1899] 1 Q. B. 1015.

a volunteer, went to the assistance of his master, who was being assaulted by roughs in the street.

[HAMILTON L.J. referred to *Murphy* v. *Berwick*. (1)

COZENS-HARDY M.R. In *Craske* v. *Wigan* (2) I am reported to have said "it is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.'" That does not express what I intended to say. I think the word "or" in that passage should be read "and."]

Here the man was bound to do something in his master's interest. The injury by accident plainly arose out of the employment: *Nisbet* v. *Rayne* (3); *Challis* v. *London and South Western Ry. Co.* (4); *Anderson* v. *Balfour*. (5) In all these cases what happened was caused by the tortious intervention of a third person.

[HAMILTON L.J. Suppose Parkes had not struck the workman at once, but had gone away after being spoken to for some minutes, and had then returned and struck the blow which resulted in the injury. Would that have made any difference?]

It is submitted that it would. In the strictest sense this was a risk incidental to the performance of the workman's duty and therefore to his employment.

The question whether a workman is by the nature of his employment exposed to unusual risks is only material in cases where those risks are such as arise from extraordinary natural causes, e.g., the risk of being struck by lightning. [He also referred to *Fitzgerald* v. *Clarke*. (6)]

Shakespeare, in reply. An accident caused by the tortious act of a fellow workman does not arise out of the employment if it has no relation to it: *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (7) The workman must shew that the risk was specially connected with the work: *Kitchenham* v. *Owners of S.S. Johannesburg*. (8) There is no evidence that carters in the district are peculiarly liable to assault.

Cur. adv. vult.

(1) (1909) 2 B. W. C. C. 103.
(2) [1909] 2 K. B. 635, 638.
(3) [1910] 2 K. B. 689.
(4) [1905] 2 K. B. 154.
(5) [1910] 2 I. R. 497.
(6) [1908] 2 K. B. 796.
(7) [1902] 2 K. B. 178.
(8) [1911] A. C. 417.

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Feb. 6. COZENS-HARDY M.R. The facts in this case are very remarkable. Mitchinson was the driver of and in charge of a furniture van at Birmingham. The van was standing in Woodcock Street. Mitchinson was standing on the footpath. It is not suggested that this was not in the course of his employment. A man named Parkes, who was the worse for drink, came towards the van, and either touched, or was about apparently to touch, the horse, when Mitchinson warned him that the horse might hurt him. Parkes then struck Mitchinson a heavy blow, and before Mitchinson could protect himself a second blow followed, which felled him to the ground and caused his death. It was a wholly unprovoked assault by Parkes, who was tried at the assizes for manslaughter and found guilty. The dependants now say that this was an injury caused by an accident arising out of and in the course of his employment as a carter, and the learned judge has so held.

Two points are taken by the employers on this appeal—first, that there was no accident within the meaning of the statute, the act done by Parkes being wilful and felonious. I do not think that in this Court that argument can prevail. We have held in several cases, and particularly in *Nisbet* v. *Rayne* (1), that there may be an accident although it was due to an intentional act on the part of the felon. In Ireland the same view has prevailed, but in Scotland a different view has been taken. The point can in my opinion be raised only in the House of Lords.

Secondly, assuming that there was an accident, it did not arise out of the employment. The risk of being assaulted by a drunken man was not in any way specially connected with, or incident to, the employment of a carter, and, therefore, the decision in this Court, and in the House of Lords, in *Warner* v. *Couchman* (2) applies. I think this contention must prevail unless the respondents' counsel can make good their proposition that the question of unusual risk incident to the employment arises only when natural causes, such as lightning and frost, are concerned. But I am unable to find any warrant for this distinction. Indeed, I think the contrary has been established. In *Blake* v. *Head* (3),

(1) [1910] 2 K. B. 689.
(2) [1911] 1 K. B. 351; [1912] A. C. 35.
(3) 5 B. W. C. C. 303.

where a servant was injured by a blow struck by his master with a hatchet, it was held that the accident did not arise out of the employment. It was pointed out that if the man had been employed as an attendant in a lunatic asylum, and had been assaulted by one of the inmates, his employment might well have been held to have involved such a special risk that the accident might have been held to arise out of the employment. *Nisbet* v. *Rayne* (1) is a distinct authority on the point. The cases where injury has been caused by larking, such as *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (2), all proceed upon the same line.

It has been strenuously argued that as the driver was in charge of his master's property, any accident caused while defending or protecting that property was in his master's interest and must therefore be held to arise out of his employment. I cannot accept this view. It seems to me to draw no distinction between "in the course of" and "arising out of," and in fact to strike out of the statute the words "arising out of."

I have read and considered the evidence and the learned judge's findings of facts. He does not find that there was any special risk incident to the employment of carter. I think the foundation of his judgment is to be found in this passage, "he was acting in his master's interest by endeavouring in the least offensive manner possible to prevent interference with his masters' property, and performing a positive duty he met an untimely death." In my opinion this is not sufficient to justify the award. I think there was no evidence to justify the finding that the accident arose out of the employment. That being so, the appeal must be allowed with costs both here and below.

BUCKLEY L.J. Leaving for the moment the multitude of decisions I go back to the words of the statute. In the facts which the county court judge has found was there personal injury by accident arising out of the employment? I answer no. The injury resulted not in any sense from the employment but from the brutality of a drunken man. Mark that I here

(1) [1910] 2 K. B. 689. (2) [1902] 2 K. B. 178.

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affirm two things. The first: negative, that it did not result from the employment. The second: affirmative, that it did result from the brutality of a drunken man. Had the answer to the former been in the affirmative it may be that the answer to the latter would have been immaterial. If the occurrence arose in any proper sense "out of the employment" (a phrase which I will explain in a moment), then the fact that the acts done were wilful and intentional in the party inflicting the injury may leave the occurrence so far as the victim is concerned an accident. I hope I am not too confident in saying that all the decisions are consistent with these propositions.

I have just used the expression "If the occurrence arose in any proper sense out of the employment." I purposely here use the word "occurrence" and not accident. For one of the questions always is whether the occurrence happened by accident or not. As Lord Loreburn said in *Warner* v. *Couchman* (1), the Act does not speak of an accident but speaks of injury by accident arising out of the employment. The question therefore is whether the occurrence is such as that there has resulted personal injury by accident arising out of the employment. This means personal injury fortuitously arising out of the employment. To satisfy the words of the Act the occurrence must in my judgment be one in which there is personal injury by something arising in a manner unexpected and unforeseen from a risk reasonably incidental to the employment. Nothing can come "out of the employment" which has not in some reasonable sense its origin, its source, its causa causans in the employment. That the injury must be one resulting in some reasonable sense from a risk incidental to the employment has I think been decided over and over again. I refer to the judgments in *Challis* v. *London and South Western Ry. Co.* (2), where for instance Lord Collins, then Master of the Rolls, says that the words of the statute necessarily involve the consideration of the question what risks are commonly incidental to the particular employment in question; to the judgments in *Fitzgerald* v. *Clarke* (3), *Craske* v. *Wigan* (4), *Barnes* v. *Nunnery*

(1) [1912] A. C. 35, 38.
(2) [1905] 2 K. B. 154.
(3) [1908] 2 K. B. 796.
(4) [1909] 2 K. B. 635.

Colliery Co. (1), and in Scotland *Falconer* v. *London and Glasgow Engineering Co.* (2) To these many others might be added.

It has been suggested that, inasmuch as serious and wilful misconduct is no bar to compensation in certain cases (namely, where death or serious and permanent disablement ensues) and as no man is employed to misconduct himself, that the above requires qualification. I think not. Men unfortunately are often careless and reckless. The risk that they will be careless and reckless is an incident of their employment. But if the man, whether carelessly and recklessly or not, incurs a risk not incidental to his employment, the resultant injury does not arise by accident out of his employment.

To justify my statement as to the result of the decisions I will very shortly deal with some of the many cases which have been cited to us in the present case. In *Nisbet* v. *Rayne* (3) the man's employment was one in which he was particularly exposed to the risk of murderous attack by reason of the fact that he was known periodically to carry large sums in cash. The attack upon him arose out of a risk incidental to his employment and he was entitled to compensation notwithstanding that the murderer's attack upon him was wilful and intentional. By way of contrast in *Blake* v. *Head* (4) the murderous attack by the master upon his errand boy did not arise out of the employment because it was not in any proper sense incidental to the employment. The engine driver injured by the stone in *Challis* v. *London and South Western Ry. Co.* (5) and the bricklayer injured by lightning in *Andrew* v. *Failsworth Industrial Society* (6) were entitled to compensation because their respective employments compelled them to expose themselves to the particular risks by which they were injured. Whereas the boy in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (7), like the applicant in *Blake* v. *Head* (4), failed because he suffered from a tortious act which had nothing to do with the employment at all. The same was true

(1) [1912] A. C. 44.
(2) (1901) 3 F 564.
(3) [1910] 2 K. B. 689.
(4) 5 B. W. C. C. 303.
(5) [1905] 2 K. B. 154.
(6) [1904] 2 K. B. 32.
(7) [1902] 2 K. B. 178.

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of the cook in *Murphy* v. *Berwick*. (1) So again the collector who was killed when riding his bicycle in the course of his employment in *Pierce* v. *Provident Clothing and Supply Co.* (2), and the man who was killed by the accident of a runaway horse when he was travelling in a tramway truck in carrying a report from the pit's mouth to the office in *Rees* v. *Thomas* (3), and the gamekeeper who was shot by the poachers in *Anderson* v. *Balfour* (4) were, but the man who was injured by frost-bite in *Warner* v. *Couchman* (5) and the man injured in the street brawl in *Collins* v. *Collins* (6) were not, entitled to compensation because in the one case the injury resulted from a risk which was, and in the other from one which was not, reasonably incidental to the employment.

Mr. Walsh's argument when analysed really amounts to this. He says the violence of the drunken man resulted from action taken by the carter to protect his master's property. Whatever ensued from that arose out of his employment as a carter. If this is right, I may strike out of the Act the words "out of the employment." If Mr. Walsh is right it is unnecessary to look beyond seeing whether the events occurred in the course of the employment. The Act does not stop short with those words. It is necessary to shew that the injury arose also by accident arising out of the employment.

In my judgment the injury in this case did not arise out of the employment of the man as a carter at all. Whether he had been a carter or a postman or a foot passenger or any one else with whom this drunken man had an altercation the same injury might have resulted. The accident, assuming there was an accident, did not arise out of the employment but out of the fact that the man who was killed was exposed as anybody else might have been exposed to the violence of a brutal drunkard in the street. In my judgment the appeal succeeds.

HAMILTON L.J. We are bound by the authority of *Nisbet* v. *Rayne* (7) to hold that there was an "accident" in this case, and

(1) 2 B. W. C. C. 103.
(2) [1911] 1 K. B. 997.
(3) [1899] 1 Q. B. 1015.
(4) [1910] 2 I. R. 497; 3 B. W. C. C. 588.
(5) [1911] 1 K. B. 351; [1912] A. C. 35.
(6) [1907] 2 I. R. 104.
(7) [1910] 2 K. B. 689.

since the decisions of this Court in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) and *Fitzgerald* v. *Clarke* (2) the only point open to the appellants before us is whether it was misdirection in point of law to hold on this evidence that the risk of the accident in question was not incidental to the employment, and that therefore the accident itself did not arise out of the employment.

The accident was the second blow dealt by Parkes. Except that the deceased's inoffensive and proper remark immediately preceded and to that extent caused what Parkes did, there is no causal connection between the two. The wanton act of a drunken bully might equally have been committed if the deceased had spoken to the horse instead of to Parkes, or if he had been an unemployed passer-by instead of being the employers' carter. Assuming it to be the case that the deceased spoke to Parkes in pursuance of some duty to his master, either to prevent the possibility of claims being made by persons injured by the horse, or to prevent injury to the horse which was in his charge, still the fact seems to be immaterial, because this is not a case where the accident is or is not in the course of the employment according as the workman is or is not engaged in doing something which it is his duty towards his master to do. "In the course of" is conceded here: the question turns on "out of." No doubt it is part of the duty of a carter to take reasonable care of his master's cart and horse while he has them in his charge, but I can find no semblance of authority for saying that he is bound to defend them against trespassers even to the extent of suffering violence himself. The case is not that of a gamekeeper employed to watch poachers, or of a night watchman employed to protect premises from burglary. As to such cases and the extent of the servant's duty to confront risks of assault and manslaughter as incident to his employment I say nothing. The evidence of the carters, who were called, unanimously denied that such risk as this was incident to carting, and I know of nothing in law to override that.

On the grounds, therefore, that the risk of this accident was not proved by evidence to be incident to the employment, that it was plainly on the evidence one to which any other person who

(1) [1902] 2 K. B. 178. (2) [1908] 2 K. B. 796.

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crossed Parkes's path was equally exposed whatever his employment, and that there is an entire absence of any authority for treating injury arising from a third party's crime as injury by accident arising out of the employment, except where the employment is special and involves an obligation to face such perils, I think that this appeal must be allowed.

Appeal allowed.

Solicitors: *F. J. Berryman, for T. Haynes Duffell, Birmingham; Swepstone, Stone, Barber & Ellis, for G. T. Smith & Lyde, Birmingham.*

H. C. R.

[IN THE COURT OF APPEAL.]

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EAST LONDON RAILWAY JOINT COMMITTEE *v.* GREENWICH UNION ASSESSMENT COMMITTEE. SAME *v.* BERMONDSEY ASSESSMENT COMMITTEE. SAME *v.* STEPNEY ASSESSMENT COMMITTEE.

Rating—Railway—Link Line—Rateable Value—Right to take into Consideration Extraneous Circumstances—Position, Connections, and Accommodation.

The appellants, a joint committee of six railway companies, were lessees in perpetuity of a link line joining up their respective systems at a rent equal to 56 per cent. of the gross profits of the line with a minimum of 30,000*l.* per annum. In the quinquennial valuation list for 1905 the rateable value of a portion of the line had been fixed at 3326*l.* In every year since 1884 the tenancy and working of the line had resulted in a loss to each of the lessee companies. Between 1904 and 1909 the gross receipts shewed a fall of 28 per cent. and a reduction in working expenses of 8 per cent. only. Since 1907 the expenses, exclusive of rent, had exceeded the receipts.

Upon an appeal to quarter sessions against the assessment in the quinquennial valuation made in 1910, evidence was given that the line was being worked at a loss and that none of the companies concerned would give any rent for the line whatever if it were vacant and to let. The Court of quarter sessions took the figures of 1905 as the basis of their calculation for 1910 and, after taking into account the position, connections, and accommodation of the line and the possible competition for a tenancy thereof, fixed the rateable value in the parish in question at 1995*l.* The Divisional Court affirmed this decision.

The joint committee appealed to the Court of Appeal on the grounds (1.) that it was decided in *Great Central Railway* v. *Banbury Union* [1909]

A. C. 78, that the parochial principle was alone applicable to rating a link line of railway, and that the line ought to be assessed at a nominal value only; and (2.) that the Court of Quarter Sessions was not entitled to take into consideration the extraneous circumstances, such as the position, connections, and accommodation of the line:—

Held, affirming the decision of the Divisional Court, that there was nothing in *Great Central Railway* v. *Banbury Union* [1909] A. C. 78 to affect the decision in the present case, and that the Court of quarter sessions had not gone wrong in taking the extraneous circumstances into consideration.

Great Central Railway v. *Banbury Union* [1909] A. C. 78, considered and explained.

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SAME *v.* BERMONDSEY ASSESSMENT COMMITTEE.

SAME *v.* STEPNEY ASSESSMENT COMMITTEE.

APPEAL from the decision of a Divisional Court upon a case stated by the Court of Quarter Sessions for the county of London.

The case was as follows:—

1. This was an appeal by the appellants to the Court of Quarter Sessions for the county of London against the quinquennial valuation list for the parish of St. Paul, Deptford, in the Greenwich Union, made in the year 1910. The appellants were assessed in the said list as occupiers of certain lines of railway, being part of the East London Railway, at gross value 4624*l.*, rateable value 2326*l.*

2. The appellants are a joint committee under the East London Railway Act, 1882 (45 & 46 Vict. c. clxxxi.), and represent the following railway companies, namely, the London, Brighton and South Coast, the South Eastern, the London, Chatham and Dover, the Metropolitan, the Metropolitan District, and the Great Eastern, as lessees of the East London Railway, a portion of which runs through the parish of St. Paul, Deptford. The said Act, together with the East London Railway Act, 1865 (28 & 29 Vict. c. li.), and the East London Railway (Further Powers) Act, 1870 (33 & 34 Vict. c. lv.), may be referred to and shall be deemed to form part of this case.

3. The East London Railway is leased in perpetuity to the said companies as from October 1, 1884, by a lease dated March 30, 1889, under the said East London Railway Act, 1882. The rent agreed to be payable under the said lease was equal to 56 per cent. of the gross receipts of the said railway, with a minimum rent of 30,000*l.*, to be increased in certain contingencies. The rent now payable thereunder is 30,000*l.* per annum, but it was not contended

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that such rent represented the rateable value of the said railway. Previously to the passing of the said Act, namely, from June 1, 1870, and down to October 1, 1884, the said railway was worked by the said London, Brighton and South Coast Railway Company. The said Great Eastern Railway Company were not a party to the said Act of 1882, but power was reserved therein to that company to participate in the said lease, and they in fact elected to join with the rest of the said companies in entering into the said lease.

4. The object of the said six companies in taking the said lease was to develop what was believed to be an important route from north to south, but it was alleged by the appellants that the expectations by which the said companies were induced to become tenants of the said railway had proved ill-founded. It was alleged by the respondents that the position, connections, and accommodation of the said railway had impelled the said companies to enter into the said lease.

5. The said East London Railway is approximately 296 chains in length and runs through several parishes of which St. Paul, Deptford, is one. It has no terminal stations and forms a link between the systems north and south of the Thames which belong severally to the aforementioned lessee companies, but there are alternative routes by which traffic from the lines of each of the said companies could be carried across the river either over the line of such company or over that line in conjunction with that of some other company.

6. The general manager (or one of the principal officers) of each of the said companies stated in evidence on behalf of the appellants that if the East London Railway were vacant and to let, his company would not be willing to give any rent for it whatever, and that owing to the position of the East London Railway and the railways of the several lessee companies respectively it would not be possible except at prohibitive rent and engineering cost for termini to be made for the East London Railway itself. The geographical and physical position of the East London Railway does not enable it to get immediately on to the lines of companies other than the lessee companies.

7. In the quinquennial valuation list for the said parish made

in the year 1905 the portion of the said railway running through the said parish was assessed at gross value 5624*l.*, rateable value 3326*l.* In confirming the said assessment on appeal the Court of quarter sessions stated that "they took into account the geographical position of the line and the fact that it was a link between other systems." This decision was confirmed by the High Court. The said gross and rateable values were first fixed by the Court of quarter sessions upon an appeal brought by the appellants against the quinquennial valuation list made in the year 1890 and were inserted in the quinquennial valuation lists made in the years 1895 and 1900 respectively, as well as in the quinquennial valuation list made in the year 1905. The said values were confirmed by the said Court upon an appeal against the quinquennial valuation list made in the year 1900 as well as upon the appeal against the quinquennial valuation list made in the year 1905 and already referred to.

8. In the said list of 1905 the Court of quarter sessions fixed the rateable value of portions of the line at figures which would have amounted for the whole line to a rateable value of 8000*l.*

9. In every year since 1884 the actual tenancy and working of the said railway (after debiting the amount of the rent payable under the said tenancy) have resulted in a financial loss to each of the said several companies. As compared with the year 1904 the gross receipts earned by the East London Railway in 1909 showed a fall of 28 per cent. and the working expenses of the said railway had been reduced by 8 per cent. only. In deciding the present appeal against the quinquennial valuation list made in the year 1910 the Court of quarter sessions took into account the increased loss above referred to and fixed the rateable value of the said railway in the parish of St. Paul, Deptford, at 1995*l.*, being about 40 per cent. less than the rateable value appearing in the quinquennial valuation list made in the year 1905 as hereinbefore stated.

10. The following table shews the gross receipts during the past six years and the expenses exclusive of rent:

[The table gave the receipts and expenses for the years 1904 to 1909 inclusive, shewing in 1904 a balance of 7359*l.*, in 1905 a balance of 4146*l.*, and in 1906 a balance of 1961*l.*; in 1907 a

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loss on working of 1865*l.*, in 1908 a loss of 3059*l.*, and in 1909 a loss of 4036*l.*]

11. The appellants contended—

(*a*) That because the excess of receipts over expenses which was shewn in 1905 had now become a deficit, the assessment of the line must in any event be governed by different principles from those by which it was governed in 1905.

(*b*) That since the decision of the House of Lords in *Great Central Ry. Co.* v. *Banbury Union* (1) the East London Railway must be assessed on its own earning capacity only and not upon its value (if any) as a feeder to the several railway systems between which it formed a link.

(*c*) That there was no evidence that any of the lessee companies or any other company or person would compete for the tenancy of the East London Railway if it was vacant and to let.

(*d*) That the railway ought to be assessed at a nominal value only, which they suggested should be taken at 1*s.* per yard of single line.

12. No evidence was called on behalf of the respondents.

13. The respondents contended—

(1.) That the Court in fixing the assessment of the said railway in the parish of St. Paul, Deptford, was bound to have regard to the geographical position of the said railway and the advantages thereby afforded.

(2.) That the Court in fixing the said assessment was bound to have regard to the connections and accommodation of the said railway.

(3.) That the Court in fixing the said assessment was bound to have regard to the fact that the said railway is rented, occupied and used in common by a number of railway companies.

(4.) That in view of the position, connections, and accommodation of the said railway and the possible competition for the tenancy thereof a tenant might reasonably be expected taking one year with another to pay for the said railway a rent sufficient to support the rateable value found by the Court.

(5.) That it would be wrong in law to assess the said railway,

(1) [1909] A. C. 78.

which is a line used for running traffic interchanged between various systems, as if it were a mere siding, the value of 1*s.* per yard of single line at which the appellants sought to assess the said railway being claimed by them to be the correct rateable value of sidings, ascertained upon a basis of structural value.

14. The said Court of quarter sessions held that the said Court was still entitled to take into consideration the extraneous circumstances referred to in the respondents' contentions numbered (1.) to (4.) inclusive.

The Court accordingly fixed the assessment for the parish of St. Paul, Deptford, in the Greenwich Union, at 1995*l.*, and for other parishes in the boroughs of Bermondsey and Stepney respectively at 1368*l.* and 639*l.*

The question for the Court was whether the decision of the said Court of quarter sessions was right in law.

If the Court should hold that the decision of the said Court of quarter sessions was right, that decision was to stand.

If the Court should hold that the decision of the said Court of quarter sessions was wrong, the said decision was to be quashed and the Court was to make such order therein as the said Court should think fit.

Cases were also stated raising the same question between the appellants and the assessment committees of the boroughs of Bermondsey and Stepney.

The Divisional Court affirmed the decision of the Court of quarter sessions on the ground that that Court had not gone wrong on any principle of law either in taking into consideration the extraneous circumstances or in adopting as a basis of their calculations the figures of the 1905 valuation. Against this decision the joint committee appealed to the Court of Appeal.

Sir Alfred Cripps, K.C., and *W. C. Ryde, K.C.*, for the appellants. The real question is whether the decision in *Great Central Ry. Co.* v. *Banbury Union* (1) governs this case. It is submitted that it does.

(1) [1909] A. C. 78.

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Under the Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1, the rateable value is the rent at which the section of the line in question might reasonably be expected to let from year to year after making the deductions prescribed by the statute. In ascertaining that value two principles, inconsistent with each other, have from time to time been applied namely, the parochial principle and the contributive principle. We submit that in assessing the rateable value of this particular line foreign profits must be disregarded and the parochial principle applied.

That principle was applied in *Reg.* v. *London and Brighton Ry. Co.* (1), *Great Eastern Ry. Co.* v. *Haughley* (2), *Reg.* v. *Llantrissant* (3), and in *Great Central Ry. Co.* v. *Banbury Union* (4), where the decision in *Reg.* v. *London and Brighton Ry. Co.* (1) was recognized as shewing that as profits diminish, rent, and consequently value, also diminish.

The contributive principle was applied in *South Eastern Ry. Co.* v. *Dorking* (5), *London and North Western Ry. Co.* v. *Cannock* (6), *Reg.* v. *London and North Western Ry. Co.* (7), and *London and North Western Ry. Co.* v. *Irthlingborough.* (8) The decisions in *South Eastern Ry. Co.* v. *Dorking* (5) and in *London and North Western Ry. Co.* v. *Cannock* (6) are in direct conflict with the decision in *Reg.* v. *London and Brighton Ry. Co.* (1); and the decision in *Reg.* v. *London and North Western Ry. Co.* (7) was absolutely contrary to the parochial principle, and, logically, the reasoning in the judgments in that case cannot stand after the decision in *Great Central Ry. Co.* v. *Banbury Union.* (4) *London and North Western Ry. Co.* v. *Irthlingborough* (8) is in direct conflict with *Great Eastern Ry. Co.* v. *Haughley* (2) and must be taken as overruled.

Great Central Ry. Co. v. *Banbury Union* (4) limits the principle applicable to the profits earned in the parish, and although the judgments do not expressly deal with a case like the present, logically they cover it.

(1) (1851) 15 Q. B. 313.
(2) (1866) L. R. 1 Q. B. 666.
(3) (1869) L. R. 4 Q. B. 354.
(4) [1909] A. C. 78.
(5) (1854) 3 E. & B. 491.
(6) (1863) 9 L. T. 325.
(7) (1874) L. R. 9 Q. B. 134.
(8) (1876) 35 L. T. 327.

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[COZENS-HARDY M.R. referred to *Rex* v. *New River Co.* (1)]

That was not the case of a railway company. Lord Dunedin in *Great Central Ry. Co.* v. *Banbury Union* (2) thought it was quite distinct. There the spring generated the thing which was the source of profit. This link line does not produce any profit. See also *New River Co.* v. *Hertford Union.* (3)

In this case the evidence of the railway managers displaces the possibility of there being any competition other than that of any one of the six companies. The sessions relied upon the position connections and accommodation of the line, and that is just what was negatived by the House of Lords in *Great Central Ry. Co.* v. *Banbury Union.* (2)

The line ought to be assessed at a nominal value only.

[They also referred to *London and North Western Ry. Co.* v. *Ampthill Union.* (4)]

Balfour Browne, K.C., and *E. M. Konstam*, for the Greenwich Assessment Committee. It is the duty of the Court of quarter sessions to arrive at the rent at which the premises may be reasonably expected to let. It is said there is only one method by which that may be arrived at, but that is negatived by what was said by Lord Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.* (5) The question in this case is whether this Court can say that the Court of quarter sessions has taken into consideration anything which they ought not to have considered or excluded anything from consideration which they ought not to have excluded. It is said that if no profits are earned then there can be no rent. That is not so ; earnings are not the only criterion. Extraneous circumstances must be considered. The position and connections and accommodation of this line are things which no intending tenant of the line would disregard.

There is nothing in the decision of the House of Lords in *Great Central Ry. Co.* v. *Banbury Union* (2) which ought to affect the decision of this Court in the present case. This very case was expressly reserved for future consideration by Lord

(1) (1813) 1 M. & S. 503.
(2) [1909] A. C. 78.
(3) [1902] 2 K. B. 597.
(4) (1907) 2 Konstam's Rating Appeals, 378.
(5) [1901] A. C. 175, 180.

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Loreburn L.C. (1) In that case all that was decided was this. Two alternatives were before the House—(1.) whether quarter sessions were entitled to take into account in ascertaining the rateable value the interest on the cost of constructing the line, and (2.) whether the part of the line in question ought to be assessed only on its actual net earnings within the parish. The House decided the first question in the negative, and as to the second they held that the parochial principle was not wrong. The true question is what is the value of this link line to those who wish to possess it, that is to those who have other railway lines in connection with which they can use this link.

The Court does not give directions as to which of two alternative methods is the best for arriving at the conclusion of fact; that is for the quarter sessions: *North and South-Western Junction Ry. Co.* v. *Assessment Committee of the Brentford Union* (2); *London United Tramways* (1901), *Ld.* v. *Brentford Union.* (3)

The sessions are entitled to consider extraneous circumstances in arriving at the rateable value. Here the sessions have tried to find out what considerations would enter into the mind of the hypothetical tenant. It is impossible that he would fail to take into consideration the geographical position, the connections and accommodation of the line. The sessions have not transgressed any rule of law, but have correctly found what is really a question of fact.

Balfour Browne, K.C., and *W. Frampton,* for the Bermondsey Assessment Committee.

E. J. Naldrett and *E. M. Konstam,* for the Stepney Assessment Committee.

Ryde, K.C., in reply, referred to *Green* v. *Newport Union.* (4)

Cur. adv. vult.

Dec. 19. FARWELL L.J. The only question to be answered by the assessment committee in rating appeals of this nature is one of fact—what would the hypothetical tenant give for the

(1) See [1909] A. C. at p. 87.
(2) (1888) 13 App. Cas. 592.
(3) (1907) 2 Konstam's Rating Appeals, 410, 426.
(4) [1909] A. C. 35.

property in question for a year: *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.* (1) In the case of a portion of a railway the question is exceedingly difficult to answer, but the committee have to do it as best they may, and the Court cannot interfere so long as they neither wrongly admit nor wrongly reject evidence: for this purpose they are in the same position as a jury, and this Court regards their decision in the same way as it regards the verdict of a jury on an application for a new trial. The grounds on which the committee may found their conclusions are numerous and necessarily vary with the circumstances of the different cases—considerations which may be legitimate in one set of circumstances may be improper in another: it is impossible to lay down any general rule applicable to all cases, or to divide the decided cases into categories and say that the parochial category is right and the contributive category is wrong or vice versa: either or neither will be right or wrong according to the circumstances of the particular case. Thus, the fact that the land in question (say a siding) is being rented by the company from year to year at a rent may well be thought to be sufficient evidence of value without more, but it is also clear that the rent paid is not conclusive, and if it does not in the opinion of the committee represent the true value to the hypothetical tenant, some other basis of valuation must be found. The fact that no actual profit is earned by means of the property is not conclusive that it is of no rateable value: *London County Council* v. *Erith and West Ham.* (2) Nor is the actual profit earned thereby in itself the measure of the rateable value, although it may and often does afford a basis on which to estimate such value: e.g., if the owner of a patent medicine rents a strip of land at 10*l.* a year on which to put up hoardings with his advertisements thereon, it would be absurd to take an account of the profits made by the sales of his goods all over the country and found on such profits a new estimate of the probable value of the strip; and again, while avoiding the "blackmailing" estimate founded on the necessity of a company possessing a mile of line in the centre of its system, it is impossible to leave out of sight the fact that nobody but the company with its lines running

(1) [1901] A. C. at p. 179. (2) [1893] A. C. 562.

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up to and connecting with each end of the mile would give a farthing for it for one year. These observations are founded on the decision of the House of Lords in *North and South-Western Junction Ry. Co.* v. *Assessment Committee of the Brentford Union* (1), a case the full importance of which has I think been overlooked in consequence of the unfortunate omission of the House of Lords reporter to state the facts of the case: these appear in 18 Q. B. D. at p. 740, where Lord Esher's judgment is well worth perusal. In that case the line to be rated formed a link between the South Western Railway, the Great Western Railway, the Midland Railway, and the London and North Western Railway, and through the latter with the North London Railway: the line was let in perpetuity to the London and North Western Railway, the Midland Railway, and the North London Railway: the appellants contended that the line was to be regarded as an integral part of the system of those three companies and ought to be rated on the parochial basis: the respondents contended that the value of the line as a connecting link, the probability that any one of the three companies would give a higher rent than the sum ascertained on the parochial basis, and the actual rent should all be taken into consideration. The arbitrator stated his award in the form of a special case asking in effect which of those views was correct, and the House, holding that no question of law was raised, sent it back to the arbitrator to find the proper value. Lord Halsbury (2) says: "Now in the case before your Lordships, I am not prepared to say that, subject to one question which I will refer to in a moment, either of the courses suggested, if the facts were found which would render the calculations accurate, would be contrary to the statute. I think it would be impossible to say that either of the modes of calculation is obligatory. The thing is to be valued as it is for the purpose for which it is used, and its value is to be ascertained upon the principle which is enacted by the statute. One topic which I said I would deal with separately and which I will describe as the blackmailing contract, I think ought to be dismissed from any such consideration; but with that exception the questions in debate are questions which if not actually themselves questions

(1) 13 App. Cas. 592. (2) 13 App. Cas. at p. 593.

of fact are questions into which fact enters so largely that they are questions for the arbitrator himself to decide. He must find what in his judgment the value is. All he can remit to any Court to assist him is a question of law, and he must in that case affirmatively find the facts upon which the question of law depends." Lord Watson says: "My Lords, there are principles of valuation which depend on purely legal considerations, and any misapplication of these is open to correction by the Courts. But there are also certain so-called principles of valuation which are simply formulæ for arriving at the solution of questions of fact which have commended themselves to valuators of experience. There may be several alternative formulæ of that kind, all of them capable of leading to a just and reasonable conclusion. It is for the arbitrator, who is constituted the judge of the facts, to determine for himself which rule of that kind he will accept for his guidance." Applying this to the present case, and the two contentions raised by the appellants, the first, namely, that the *Banbury Case* (1) has altered the law and has overruled numerous well-known authorities, is in my opinion unfounded: it was really not open to the House, bound as it is by the *Brentford Case* (2), to exclude either the parochial or the contributive system entirely from the consideration of the committees in all cases and under all circumstances, nor has the *Banbury Case* (1) attempted to do so: the decision was simply that the purchase-money paid for the line in question was not a legitimate element in the consideration of the rent payable by the hypothetical tenant in that case. It is true that some portions of Lord Dunedin's speech appear to go a good deal further, but none of the other Lords expressed their agreement with him, and the Lord Chancellor's speech is inconsistent with Lord Dunedin's. It is the decision of the House only that binds the Court; the opinions of individual Law Lords are valuable in assisting us to form our own judgments, but are of no binding authority; for example, if a decision of the Exchequer Chamber were criticized unfavourably in the House of Lords, it would remain binding on us unless it were expressly overruled. The House of Lords by its order can declare the law to be entirely different from

(1) [1909] A. C. 78. (2) 13 App. Cas. 592.

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anything that it has been supposed to be for years, but no opinion of individual peers, however eminent and however numerous, can have this effect. If the decisions criticized were those of Courts of first instance, this Court might very probably adopt the opinions of the Law Lords and overrule the impugned decisions, but they would do so on their own responsibility and by virtue of their own authority. If the impugned decisions were decisions of the Court of Appeal, this Court could not overrule them. In my opinion, therefore, there is nothing in the *Banbury Case* (1) in the House of Lords that should affect our judgment in this case. The appellants' second contention is, however, a different matter and is a legitimate ground of complaint, although in my opinion quite untenable: it is that the committee were not entitled to look at extraneous circumstances, that is, the "position and connections and the accommodation" of this line. (The words are taken from the judgment of A. T. Lawrence J. in *East London Railway Joint Committee* v. *Greenwich Union* (2).) It is obviously impossible to disregard the position, i.e., the local situation, of the line: a mile of line in the abstract or at large is impossible of consideration for any practical purpose: its connections are of the essence, for its use depends on the access to it just as the value of a retail shop depends to a great extent on its accessibility; and its accommodation is the element of value arising from the fact that it is of value as an accommodation to the lessee lines: all these are elements of value which the hypothetical tenant may fairly be assumed to take into consideration. Indeed it is only by contending that the cases of contributive value are overruled that the argument becomes tenable, and as I have already stated that they are not overruled, the argument fails. When we find railway companies in possession as lessees of a link line which couples up their several systems, rented on terms that shew that the lessee companies never contemplated making any profit out of the link line itself (as is apparent from the sections in the private Act, read by Mr. Balfour Browne), it is obvious that, unless we are to regard them as philanthropists or lunatics, they must have contemplated making profits outside the line which made it worth their while

(1) [1909] A. C. 78. (2) (1907) 97 L. T. 404, 410.

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to rent the line at all. They must have taken into consideration the position and connections and accommodation of the line; the rent they have given is not a necessary criterion of the rent the hypothetical tenant would be willing to give now, but the same elements come into consideration. The committee has dealt with the problem in the way pointed out by the Lord Chief Justice and not seriously challenged before us; it was merely suggested by Mr. Ryde in his reply, and I agree with the Divisional Court that they were entitled so to deal with it if they thought fit.

In my opinion this appeal fails and should be dismissed with costs.

HAMILTON L.J. I agree. As the valuation of a hereditament for rating purposes is essentially a question of fact, the appellants must establish, if they are to succeed on this appeal, either that the Court of quarter sessions admitted to their consideration something that is in law irrelevant to that question, or that they disregarded something that is in law material to it, or both. Accordingly the appellants' arguments are: (i.) The sessions ought to have proceeded exclusively upon the "parochial principle," because in the *Banbury Case* (1) the House of Lords has either decided that the parochial principle alone is applicable in rating a link line of railway, or has inferentially condemned the application of any other by observations too authoritative and by reasons too cogent to be outweighed by the existence of long-standing decisions in favour of the "contributive principle." (ii.) Although the Court of quarter sessions has not in terms either rejected the parochial principle or admitted the contributive principle, consideration of the evidence before it shews that it must have done both. Here is a line which demonstrably does not now make both ends meet in working and of which the only railway companies who have physical access to it say that except under compulsion they would not, either severally or in the present or any combination, rent it at all. How then can a value of 4002*l.* have been fixed as that which a hypothetical tenant would give from year to year, unless matters extra-parochial had been taken into account, and profits to be earned

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outside the respondent parishes have been admitted as evidence of the measure of net annual value within them? Although before the Court of quarter sessions the respondents advanced the contention that possible competition among the six leasing lines ought to be taken into account, the Court in its judgment makes no allusion to such competition, and I think it better to assume, having regard to the evidence given, that the Court did not act on this contention. The Court rests its conclusion on the evidence of the "position, connections, and accommodation" of the line, and I think that these matters must be taken to have been the grounds on which it proceeded. A point was suggested before us, but not really taken or argued, that whatever the grounds may have been, the figure adopted rested on no real evidence and must be regarded as a mere guess and not as a judicial decision. The quantum of valuation is peculiarly within the competence of the sessions, and, although some quantum has always to be fixed if the hereditament is not found to be of no net annual value, it is often the case that precise evidence cannot be given with regard to it. I am of opinion that the Court had materials of fact before it sufficient to enable it to act, and that, in arriving at the figure at which it did arrive, no error in point of law was committed by it.

By "position" I take it that the Court alluded to the fact that the East London Railway provides means of communication by direct passage under the Thames between railway lines to the north and railway lines to the south of the river. By "connections" it means the continuity that exists between the metals of the East London Railway and those of each of the six lessee companies. "Accommodation" I take to refer to the advantages which the six lessee lines derive from the position and connections of the East London Railway in respect of traffic over it and otherwise. Certainly at one time these advantages were expected to be highly valuable. The line was made at very considerable cost, largely for their sake. Indeed it is found that the line has no terminals of its own and few stations, and that terminals could only be constructed at prodigious and prohibitive cost. It was leased in perpetuity by the lessee lines on the terms that a rent of 30,000*l.* a year at

least should be paid for the line, and possibly more, while the lessees were to derive no direct profit from working the leased line at all. Unless the hopes of the builders and lessees of the line have been lamentably disappointed, there is considerable evidence that a hypothetical tenant would be willing to rent the line at more than a nominal sum for the sake of its accommodation, apart from profits to be earned in the shape of the excess of traffic receipts earned on it over and above working expenses attributable to it. There was then evidence of advantageous position, connections, and accommodation, and these are not, in law, topics which it is improper for a Court of quarter sessions to take into account. The appellants must therefore say and impliedly they do say (1.) that position and connections are relevant only in so far as profits may be made within the rating area by reason of them; (2.) that accommodation, whatever it may mean apart from a length of running line, only means in this connection the position and connections of it over again; and (3.) that when a piece of running line does not of itself yield anything, it cannot be right to abandon the parochial principle which alone is applicable as long as that line of itself yields something however little, and resort to the contributive principle by taking account of profits made off the line, which would have been excluded so long as the profits made on the line, however little, were not reduced to zero. That extra-parochial advantage may be looked at as the reason why a hypothetical tenant would be willing to rent a hereditament at a sum much in excess of the purely intra-parochial benefits to be got from it has been frequently decided. In 1813: *Rex* v. *New River Co.* (1) "the property," says Lord Ellenborough, "is locally valuable in the parish where it is rated, although that value is derived from extrinsic circumstances, and although the profits are actually received elsewhere." See too *Reg.* v. *London and North Western Ry. Co.* (2) I think that such a case as the present is one of those expressly reserved by Lord Loreburn in the *Banbury Case* (3) for future consideration. No authority was cited to shew that a piece of running line may not be capable of having

(1) 1 M. & S. 503.
(2) L. R. 9 Q. B., per Blackburn J., at p. 145.
(3) [1909] A. C. at p. 87.

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a net annual value as accommodation just as much as, say, an advertisement hoarding rented not for any direct profit to be earned from it, but for the sake of its supposed effect on possible profits to be made on the whole or on part of the line. The point was never really argued, but the appellants tacitly assumed that a link in a line of through traffic can only be valued in law on one of two principles, the parochial or the contributive; and that the only advantage to the railway company which has to be looked at consists in the advantage which a branch line confers on a main line as a "feeder," so that the advantage of occupying the link line is measured only by an assumed number of passengers or quantity of goods brought from one part of the railway system to the other over the link line resulting in an attribution of part of the fares or tolls to the line in question by mileage. I think this erroneously overlooks the aspect of a link of running line in which it may truly be regarded as accommodation merely. It may usually be the most convenient and proper formula to measure the value of a link in a line of railway by reference to the net receipts attributable to traffic carried over it; but I cannot think that it must in law be wrong for the sessions to hold that there are cases in which such a formula is not alone nor exhaustively applicable, cases where, apart from or in the absence of any such receipts, the line may be attractive to a hypothetical tenant, simply as a short cut, facilitating the general working of the line, as exchange sidings do, or as the accommodation of a specially rented passenger platform in alieno solo might be supposed to do, though nothing could be specially charged for it as for a terminal service. The sessions have held that this is one of such cases. If this is so, all the other contentions of the appellants would be insufficient for success in this appeal, because, as there is evidence that position and connections result in an accommodation value leading a hypothetical tenant to offer a rent, it is peculiarly for the Court of quarter sessions to draw its own conclusion as to the value of such accommodation. I can accordingly deal very briefly with the other points raised. The decision of the House of Lords in the *Banbury Case* (1) was that a valuation simply and avowedly

(1) [1909] A. C. 78.

based on the cost of construction of the line was wrong, for cost of construction is not per se in such circumstances as those there under discussion the measure of the rent that a hypothetical tenant would pay: see per Lord Loreburn L.C. (1) and per Lord Dunedin. (2) No allusion was made to that "geographical position" which, according to their contention as stated in the report of the case before the Divisional Court, the Banbury Union had relied on, in addition to the interest on the cost of construction; nor was there any occasion to do so, for it was not the principle on which the sessions had acted, and it was only used as a speculative ground on which possibly the figure adopted by the sessions might also have been supported. The House assumed that this link line had in fact no "special value" other than that which any other equal length of the whole line of through traffic would have had: see per Lord Loreburn L.C. (3) The sessions had further found an alternative sum as that which they considered right, if cost of construction was not to be taken into account, and the House of Lords was not asked to send the case back in order that any third finding should be arrived at. The House had before it the reason upon which the sessions arrived at this alternative finding, and had not before it any evidence or contention that inadmissible matters had been looked at except as to cost of construction, or that any admissible matters had been overlooked or rejected by the sessions in finding the figure of 102*l.* It is true that in the *Sheffield Case* (4), decided immediately after and as a formal consequence of the *Banbury Case* (5), the House increased the Sheffield assessment, but this was only because such an alteration followed from the actual reduction made in the Banbury assessment. An allowance had been made to the railway company in its Sheffield assessment because it had been assessed in Banbury at a special value beyond the profit-earning capacity of the line in Banbury. If the latter special value was displaced the allowance fell with it. I cannot accept the argument that the House of Lords must be deemed inferentially to have decided that in dealing with a

(1) [1909] A. C. at p. 84, pars. 1 and 2.
(2) Ibid. at p. 95, last paragraph.
(3) Ibid. at p. 86.
(4) [1909] A. C. 97.
(5) [1909] A. C. 78.

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link of running line the formula known as the strict parochial principle is alone admissible, and that no matter what facts may be found in such a case the sessions may not have regard to extra-parochial facts, even though they consist merely in objects to be served outside the parish by the occupation of a hereditament within the parish, thus inducing a hypothetical tenant to be willing to rent the hereditament as accommodation for his general business. By a decision of the House of Lords which binds us, the choice of one or other of the formulæ for estimation of the hypothetical rent, which now are or hereafter may be recognized among valuers and denominated "principles of valuation," is a choice which rests with the sessions, the tribunal of fact. It is not for the tribunal of appeal to lay down or indicate a preference for one over the other as matter of law, nor to ban any particular formula, unless it is shewn to involve the introduction of irrelevant considerations or the rejection of relevant considerations: *North and South-Western Junction Ry. Co.* v. *Assessment Committee of the Brentford Union.* (1) Again it has been said that "parish officers in ascertaining the fact of net annual value" are not limited by any rule of law or any statute as to the mode in which they shall arrive at it: per Lord Halsbury in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.* (2) I think we are bound to uphold the decision of the sessions in this case because they adopted a formula which in their eyes was applicable to the calculation they had in hand, having admissible evidence in favour of it duly given before them.

I am accordingly of opinion that in taking this view the Divisional Court was right and that its decision should be affirmed with costs.

COZENS-HARDY M.R. I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Bristows, Cooke & Carpmael, for the appellants; H. W. Saw, Agent for S. Saw, for the Greenwich Union; Frederick Ryall, for the borough of Bermondsey; Alfred Turner, for the borough of Stepney.*

(1) 13 App. Cas. at p. 594. (2) [1901] A. C. at p. 180.

G. A. S.

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Feb. 14.

County Court—Costs—Taxation—Allowance for Two Counsel—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 72, 164—*County Court Rules*, 1903 *and* 1904, *Order* XXIIa, *r.* 27; *Order* LIII., *r.* 45.

On the taxation of the costs of an action brought in the county court under the extended jurisdiction conferred by the County Courts Act, 1903, in which the successful party has been represented at the trial by two counsel, there is no power to allow the fees of more than one counsel.

APPEAL from Westminster County Court.

An action was brought in the county court in which the plaintiff claimed 100*l.* damages for tort. At the trial the defendants were represented by two counsel, a King's counsel and a junior. Judgment was given for the defendants with costs. On taxation of the defendants' costs under column C of the Higher Scale, the registrar allowed items 85 and 87 (fee with brief and conference) in respect of both counsel. The plaintiff objected to the allowance of these two items in the case of the King's counsel on the ground that the registrar had no power under the County Court Act or Rules to allow fees for more than one counsel. The registrar overruled the objection, and on an application to review the taxation the county court judge upheld the decision of the registrar.

The plaintiff appealed.

Morton Smith, for the plaintiff. A consideration of the various Acts of Parliament and Rules relating to the employment of counsel in the county court and the fees to be allowed on taxation shews that it was never contemplated that more than one counsel would be employed, and except in one particular case there is no provision for the allowance of fees in respect of more than one counsel. The Act which brought into existence the modern county court is 9 & 10 Vict. c. 95, and by s. 91 of that Act it is provided that a barrister-at-law instructed by the attorney of a party shall be entitled to appear for the party in a proceeding in the county court, and that "in no case shall any

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fee exceeding one pound three shillings and sixpence be allowed for employing a barrister as counsel in the cause." By 13 & 14 Vict. c. 61, s. 6, the fee for "employing a barrister" was in certain cases increased to 2*l.* 4*s.* 6*d.* The system of having different scales of costs was first authorized by s. 1 of 15 & 16 Vict. c. 54, but it would appear from a note in Cox and Lloyd's County Court Practice (1857 ed.), p. 718, that no scales of costs were in fact framed under that Act until 1856, under which scale the allowances for fees to a barrister were at the same rate as previously, with this addition, that as part of the costs of the day on an adjournment "a refresher fee to counsel and clerk" of 1*l.* 3*s.* 6*d.* might be allowed. In 1868 the present system of a higher scale divided into three columns was introduced under 30 & 31 Vict. c. 142, and the language of the items relating to fees to counsel in this scale is substantially the same as that in the existing scales which came into force in 1903 and which were made under s. 164 of the County Courts Act, 1888. The word "counsel" and not "barrister" is used in the scale and in s. 164, but that must mean one counsel only, for the word "conference" in item 87 is only appropriate to a case where one counsel is employed; if there are two counsel, the proper expression is not conference but consultation. Moreover, s. 72 of the County Courts Act, 1888, speaks of "a barrister retained by or on behalf of any party." In 1899 a new rule (now r. 45 of Order LIII.) was made for allowing increased costs in proceedings under the Rivers Pollution Prevention Acts, 1876 and 1893. This rule, which was not brought to the notice of the county court judge, provides in terms that in proceedings under those Acts "where more counsel than one are retained reasonable fees may be allowed to such additional counsel, and for consultations." But on the other hand when in 1904 a new rule, Order XXIIA, r. 27, was made dealing with the costs of actions brought under the extended jurisdiction conferred by the County Courts Act, 1903, the Rule Committee did not adopt the language of the rule of 1899, but merely provided that "where costs are taxed under column C, reasonable fees may be allowed to counsel in excess of those mentioned in items 85 to 94." The inference to be drawn from this, the latest rule on the subject, is that, except in the case

of proceedings under the Rivers Pollution Prevention Acts, there is no power to allow fees for more than one counsel.

Hon. S. O. Henn Collins, for the defendants. If there is no jurisdiction in the county court to allow fees for more than one counsel, the proper remedy of the plaintiff was to proceed by prohibition, and not by way of appeal.

[*Morton Smith.* *Gilson* v. *Kilner* (1) shews that an appeal lies from the decision of a county court judge on a review of a taxation of costs.]

As to the main point, the argument for the plaintiff is founded on a misconception of the purpose of the scales of costs. They are not scales of what sums are to be received by counsel, but of the sums which the unsuccessful litigant has to pay. It cannot be denied that under Order XXIIa, r. 27, the registrar had a discretion as to what sum should be paid by the plaintiff to the defendants in respect of fees for counsel, but it makes no difference to the plaintiff whether the sum which the registrar thinks right is ultimately received by one counsel or is divided between two. Sect. 72 of the Act of 1888 does not assist the plaintiff's case, for it does not prohibit the employment of two counsel, and the latter part of the section appears to contemplate the possibility of more than one being employed. The fact that the expression "a barrister" which occurs in the sections of the earlier Acts dealing with costs has ceased to be used in the present scales, and that the word "counsel," which is capable of a plural meaning, is substituted, supports the view taken by the county court judge. No argument can be founded on the use of the word "conference." In ordinary language "conference" and "consultation" mean the same thing; it is only in the profession that for convenience the former applies where one counsel is employed, and the latter in the case of two counsel. Order XXIIa, r. 27, cannot be construed by reference to the language of Order LIII., r. 45, which is a special rule dealing with a special subject-matter. Neither the Act nor the Rules contain any express prohibition of the allowance of fees to two counsel, and a prohibition cannot be implied from Order XXIIa, r. 27, for the language of that rule is just as applicable to two counsel as to one.

(1) (1893) 69 L. T. 310.

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A. T. LAWRENCE J. This case raises the important question whether in a party and party taxation in the county court the fees of two counsel may be allowed. The registrar held that under the rules at present in force the fees of two counsel may be allowed, and the county court judge upheld his decision. It is only fair to the county court judge to say that when the case was argued before him his attention was not called to a rule made in 1899 with reference to proceedings under the Rivers Pollution Prevention Acts which to my mind has a most important bearing on the question. I sympathize with the view taken by the county court judge because at the present time many difficult actions are brought in the county court in which it would in my opinion be advantageous if the registrar had power in the exercise of his discretion to allow fees for two counsel. But the argument which has been addressed to us on behalf of the plaintiff has satisfied me that there is no power to do so except in the one case of proceedings under the Rivers Pollution Prevention Acts. The rule made in 1899 with regard to those cases provides in terms that where more than one counsel are retained reasonable fees may be allowed to such additional counsel and for "consultations," which is the appropriate word to use when two counsel are employed. But when in 1904 a rule was made, Order XXIIA, r. 27, for the purpose of authorizing the allowance of increased costs in actions brought under the extended jurisdiction conferred on county courts by the Act of 1903, one finds that the framers of the rule have not used the language of the rule of 1899, but have merely empowered the registrar to allow reasonable fees "to counsel in excess of those mentioned in items 85 to 94, in respect of the matters referred to in those items." When one refers to those items, one finds that in item 87 the word used is not "consultation" but "conference," which is the appropriate word where only one counsel is employed. I cannot suppose that the Rule Committee who made this rule in 1904 were unaware of the rule which had been made in 1899, and, although I agree that it is possible to give a plural meaning to the word "barrister" as used in the earlier County Court Acts and to the word "counsel" in the scale of costs, yet when one finds that the rule of 1904 not only does not

follow the language of the rule made in 1899, but uses language which is appropriate to one, and not to more than one, counsel, I am unable to construe the rule of 1904 as empowering the registrar to allow fees to more than one counsel.

It was contended on behalf of the defendants that even if the registrar had no power to allow fees for two counsel in this case, he might have arrived in another way at the same result as regards the total amount of the fees to be allowed for counsel, for, it was said, the amount to be allowed was a matter entirely within the discretion of the registrar, and therefore that it made no difference to the plaintiff whether that total amount was divided between two counsel or appropriated to one only. I am unable to adopt this contention. The duty of the registrar when taxing a bill of costs is to deal with each item in the bill separately, and to decide whether the right amount has been charged; but if a sum charged under one item is not properly allowable he cannot add it on to some other item; for to do so would not be a taxation of the bill.

For these reasons I feel bound to hold, though I do so with regret, that the decision of the county court judge was wrong and that this appeal must be allowed.

I do not think that it is necessary to say anything with regard to the point that the plaintiff's proper remedy was by way of prohibition, for whether or not prohibition would lie in the circumstances of this case, it is quite clear to my mind that the county court judge had jurisdiction to hear the application to review the taxation, and that an appeal lies from his decision.

LUSH J. I cannot help regretting that I feel bound to come to the same conclusion. The jurisdiction of the county court has been so largely extended since that Court was first instituted that it is in my opinion a serious drawback to the advantages of the county court system that it should be impossible to allow the fees of two counsel in cases where the importance of the case warrants the employment of two counsel. But the question is whether there is any power to do so. Our attention has been called to a rule made in 1899 relating to proceedings

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under the Rivers Pollution Prevention Acts, and I cannot help thinking that if the county court judge had had that rule brought to his notice he would have decided the question differently. If one gives to the language of Order XXIIa, r. 27, and of the scale of costs its proper and well accepted meaning, it becomes quite clear to my mind that an allowance of fees to more than one counsel was not in the contemplation of the rule-making authority. That view is strongly confirmed by the fact that when the Rule Committee intended to provide for the allowance of more than one counsel in proceedings under the Rivers Pollution Prevention Acts they used language which was appropriate for carrying out that intention. For the purpose of construing Order XXIIa, r. 27, we are entitled to look at Order LIII., r. 45, and when one does so it becomes quite clear that an allowance for more than one counsel can only be made in the case of proceedings brought under the Rivers Pollution Prevention Acts.

Hon. S. O. Henn Collins, for the defendants, asked that the case might be sent back to the county court in order that the registrar might reconsider the amount to be allowed for the junior counsel's brief fee. It might very well be the case that, if the taxation had proceeded on the footing that there could only be an allowance for one counsel, the registrar would have allowed a larger fee for that one counsel than he had in fact allowed on the taxation for the junior counsel. As the registrar had never directed his attention to that aspect of the question he ought to have an opportunity of further considering the matter.

Morton Smith, for the plaintiff, contended that as the plaintiff had carried in objections to two specific items in the bill, namely, the brief fee and conference fee for the leading counsel, which objections had now been upheld, the Court had no power to send the case back for a further taxation of other items in the bill. If the brief fee allowed in respect of the junior counsel was insufficient the defendants should have carried in an objection to that item, but they had not done so, and the taxation as regards those items was therefore completed and could not be

reopened. [He referred to *Strousberg* v. *Sanders* (1); *Shrapnel* v. *Laing* (2); *Fox* v. *Central Silkstone Collieries*. (3)]

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The COURT held that under the circumstances there was no power to send the case back to the county court for a further taxation of the bill of costs.

Appeal allowed.

Solicitor for plaintiff: *Arthur Bates.*

Solicitors for defendants: *Stanley, Woodhouse & Hedderwick.*

F. O. R.

REEVES AND ANOTHER *v.* POPE.

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Feb. 21.

Lease—Claim by Tenant against Lessor for Damages for Breach of Contract—Mortgage of Reversion—Notice to Mortgagee of Tenant's Claim—Action by Mortgagee for Rent—Right of Tenant to set off Damages claimed from Lessor.

A building company entered into an agreement with the defendant to build and complete an hotel upon a certain site by a certain date, and the defendant thereby agreed to accept a lease of it for a term of twenty-eight years at a certain rent as soon as it was ready for occupation. The company were in default in not having the hotel completed until a much later date than that stipulated, and on that later date the defendant accepted a lease for the agreed term. Shortly afterwards the company, who were holders of a head lease for ninety-nine years from the freeholder, mortgaged their head lease to the plaintiffs. An action having been brought by the plaintiffs as mortgagees of the head lease against the defendant for rent accrued due since the date of the mortgage, the defendant sought to set off a claim for damages for the default of the company in not having the hotel ready by the stipulated time, alleging that the plaintiffs took the mortgage with notice of that claim:—

Held, that the rule of equity, that to an action by an assignee of a chose in action the defendant may set off a claim for damages against the assignor directly arising out of the same transaction as the subject-matter of the assignment, has no application to the assignment of a reversion expectant on the termination of a lease; and that the set-off could not be allowed.

POINT OF LAW raised on the pleadings.

On January 25, 1910, Lord Clanricarde, as the freeholder of

(1) (1889) 38 W. R. 117. (2) (1888) 20 Q. B. D. 334.
(3) [1912] 2 K. B. 597.

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No. 19, Berkeley Street, in the parish of St. George, Hanover Square, entered into a building agreement with the London and Northern Estates Company, whereby the company were to build an hotel upon the site, and he was to grant them a lease of it when built. On January 26, 1910, the company entered into an agreement with the defendant, Laura Margaret Pope, whereby the company agreed to erect the hotel upon the site and complete it ready for occupation by Lady Day, 1911, and the defendant agreed to accept a lease of the hotel for a term of twenty-eight years at a rent of 2600*l.* per annum, the rent to commence on May 10, 1910, or so soon thereafter as the premises should be ready for use as an hotel, and it was provided that if through the default of the company the premises should not be ready for use by Lady Day, 1911, the defendant should be at liberty to refuse to complete the lease. The company became in default in the performance of the said agreement, and the hotel was not ready for occupation until November 13, 1911, on which date the defendant accepted a lease for twenty-eight years at the agreed rent, but without prejudice to her claim for damages for the company's breach of their agreement. On November 3, 1911, Lord Clanricarde had granted in pursuance of his agreement a lease of the premises to the company for a term of ninety-nine years, and that lease the company on November 16, 1911, mortgaged by way of sub-demise for the whole term less three days to the plaintiffs, who were their solicitors. On October 9, 1912, the plaintiffs gave the defendant notice of their mortgage, and on the same date they entered into possession of the premises. At that date there was due from the defendant a large sum for rent under her lease from November 13, 1911, to Michaelmas, 1912, and on October 11, 1912, the plaintiffs commenced the present action, in which they claimed to recover that rent from the defendant as being entitled, by virtue of the mortgage to them of the head lease, to the benefit of the reversion on the defendant's lease. The defendant by way of counter-claim sought to set off her claim for damages upon the ground that that claim arose under the agreement of January 26, 1910, in pursuance of which the defendant accepted the lease under which the rent was due, and that the plaintiffs at the time that they took the mortgage of the

company's lease had full notice of the defendant's claim; that the plaintiffs consequently became assignees of the reversion on the defendant's lease subject to the implied condition that they would discharge the company's liability to the defendant. The plaintiffs contended that that counter-claim was bad in law, and that, even if the plaintiffs had notice of the facts, which was denied, no such condition as that alleged could be implied. It was ordered by the Court of Appeal that that question of law should be tried before the hearing of the action.

Hohler, K.C., *G. F. Mortimer*, and *L. G. Hoare*, for the plaintiffs. The defendant is claiming to set off damages which accrued before the date of her lease under an agreement to which the plaintiffs were not parties, and that she is not entitled to do. The plaintiffs are nothing more than mortgagees of the reversion expectant on the termination of the defendant's lease, and in that capacity they cannot be liable to the defendant except in respect of some covenant running with the reversion.

Radcliffe, K.C., and *J. D. Crawford*, for the defendant. The agreement of January 26, 1910, contained two sets of clauses, one imposing on the defendant a liability to pay the rent and perform the other covenants of the lease when granted, and the other imposing on the company the obligation to build the hotel and complete it by Lady Day, 1911. The subsequent acceptance of the lease by the defendant was merely a formality by which she in part carried out her share of the bargain. Her obligation to pay the rent and that of the company to pay damages for delay both arose out of the same agreement. That being so, the plaintiffs as assignees of the company's right to receive the rent cannot enforce that right except upon the terms of carrying out their assignors' share of the bargain and satisfying the damages consequent upon their default. Previously to the Judicature Act unliquidated damages could not by law be the subject of a set-off, but now they can: *Young* v. *Kitchin*. (1) "Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably

(1) (1878) 3 Ex. D. 127.

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connected with the dealings and transactions which also give rise to the subject of the assignment": *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1) The right to receive the rent which was transferred by virtue of the mortgage was a chose in action, and the assignee of a chose in action stands in exactly the same situation as the assignor with respect to the equities arising upon it, that is to say, he takes subject to the equities whether he had any notice of them or not: *Mangles* v. *Dixon.* (2) Here, however, it is alleged that the plaintiffs had notice, therefore a fortiori ought they to be held bound to satisfy the defendant's claim.

Hohler, K.C., in reply. The right to receive the rent was not a chose in action at all, but merely a legal incident of the ownership of the reversion; and to the assignment of a reversion the equitable doctrine of set-off has no application. If a landlord granted a lease of a farm, at the same time making a collateral agreement with the tenant to keep down the game, and subsequently failed to keep down the game whereby the tenant suffered damage, and then sold the reversion to a purchaser, it cannot be that in an action by the purchaser against the tenant for rent accrued due since the date of the purchase the tenant would be entitled to set off his claim for damages against his former landlord.

BANKES J. In this case a preliminary question of law, which is raised by the plaintiffs' defence to the counter-claim, has been ordered by the Court of Appeal to be tried before the hearing of the action, the question being whether or not the defendant, Mrs. Pope, is entitled, as against the claim of the plaintiffs for rent, to set off any claim which she may have against her immediate lessors, the London and Northern Estates Company, for the breach by them of an undertaking contained in a building agreement dated January 26, 1910. The facts lie in a small compass and they are shortly as follows. Lord Clanricarde, the ground landlord of this particular site, on January 25, 1910, entered into a building agreement with the London and Northern Estates Company. On the following day the company entered into a building agreement with Mrs. Pope. Under

(1) (1888) 13 App. Cas. 199, at p. 213. (2) (1852) 3 H. L. C. 702.

that agreement the lady on her part undertook in consideration of the agreement made by the company to take a lease of the hotel when erected upon this site upon certain terms and conditions as to rent which are not material. Upon their part the company undertook to erect the hotel, and to erect it to the satisfaction of the lady's architect by March 25, 1911, and there was a further provision that if the building was not completed to the satisfaction of the architect by that date the lease should commence to run from the date of the actual completion, and if there was any dispute as to that it was to be settled by an arbitrator. The date of the actual completion was ultimately ascertained to be November 13, 1911, and therefore under the agreement between the parties the lease which was subsequently taken by Mrs. Pope ran from that date. Meanwhile Lord Clanricarde had granted a lease of these premises to the London and Northern Estates Company, and that lease was dated November 3, 1911. The lease so granted was mortgaged by way of sub-demise by the London and Northern Estates Company to the present plaintiffs, and the date of that mortgage was November 16, 1911.

The mortgagees went into possession on October 9, 1912, and on the same date they gave notice of the mortgage to the defendant. At the time they gave that notice there was due from the defendant under her lease a sum of money for rent which had accrued due on the previous September 29. That rent not having been paid, this action was brought by the plaintiffs to recover the amount in question. They did not sue as assignees of a chose in action, nor did they allege that a notice of such an assignment had been given. The capacity in which they sued was as mortgagees, and their claim as stated on the writ was for "arrears of rent under an indenture of lease, made between the London and Northern Estates Company of the one part and the defendant of the other part, the benefit of which lease is vested in the plaintiffs as mortgagees under or by virtue of an indenture of mortgage dated 16th November, 1911, and made between the London and Northern Estates Company of the one part and the plaintiffs of the other part, notice of which said mortgage was given to the defendant on the 9th October, 1912." I think it is quite plain that as mortgagees in possession who had given

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such a notice they could, if they had thought fit, have distrained for this rent, and if they had done that the defendant could not possibly have set up as an answer to the distress the claim which she now puts forward. It, however, suited the plaintiffs better to bring an action, and the defendant claims to set off as against the claim for rent a claim which she says she has against the London and Northern Estates Company for damages because of their not having completed the hotel within the agreed time. The question I have to decide is whether she can set off any such claim. It is said on her behalf that she can do so because the plaintiffs are in the position of assignees of a chose in action who have taken the assignment with notice of all the facts and consequently subject to all the equities which attached as between the assignors and the defendant. If the plaintiffs had been assignees of the building agreement of January 26, 1910, between the London and Northern Estates Company and the defendant, I should have thought that that argument was probably correct, but they are not. They are in fact mortgagees of the term granted by Lord Clanricarde to the company, and it is as mortgagees of that term, and as being thereby entitled to the reversion to which the defendant's rent is incident, that they make their claim. I fully accept the authority of the decision in *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1), and if the facts were the same in this case I should most certainly apply the principle there laid down. So far as I can see, however, the principle of that decision has always been confined to the assignment of choses in action, rights which before the Judicature Act were assignable only in a Court of Equity; it has never been extended to the assignment of a reversion, an interest which was always assignable at law; and I can see no reason why the plaintiffs' mortgage should be treated as being subject to the equity claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Herbert Reeves & Co.*
Solicitors for defendant: *Jenkinson, Owen & Co.*

(1) 13 App. Cas. 199.

J. F. C.

END OF VOL. I.